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BRITISH INDIA

BY

SAMATUL CHANDRA DUTT, M.A., B.L.

VAKIL, HIGH COURT, CALCUTTA AND TAGORE LAW PROFESSOR.

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FOREWORD.

THESE pages are the outcome of a Course of Lectures delivered to the Students of Law in the University of Calcutta in the beginning of the year. Attempt has been made to make them useful to the profession by referring to some three thousand reported cases, too many, however, to be reconciled with one another in support of a particular point. An elaborate index has also been added to make the book useful to the public and especially to the busy lawyers.

With regard to Lecture XI, Compulsory Sales for arrears of Public Demands in Bengal, one word of explanation may be necessary. The law in force is Act I (B.C.) of 1895 ; but Act III (B.C.) of 1913 has been passed to repeal that Act, though it has not as yet come into force, preliminary notification in the Calcutta Gazette not having been made by the Local Government. Lecture XI, however, has been based mainly on Act III (B.C.) of 1913 in anticipation of the notification.

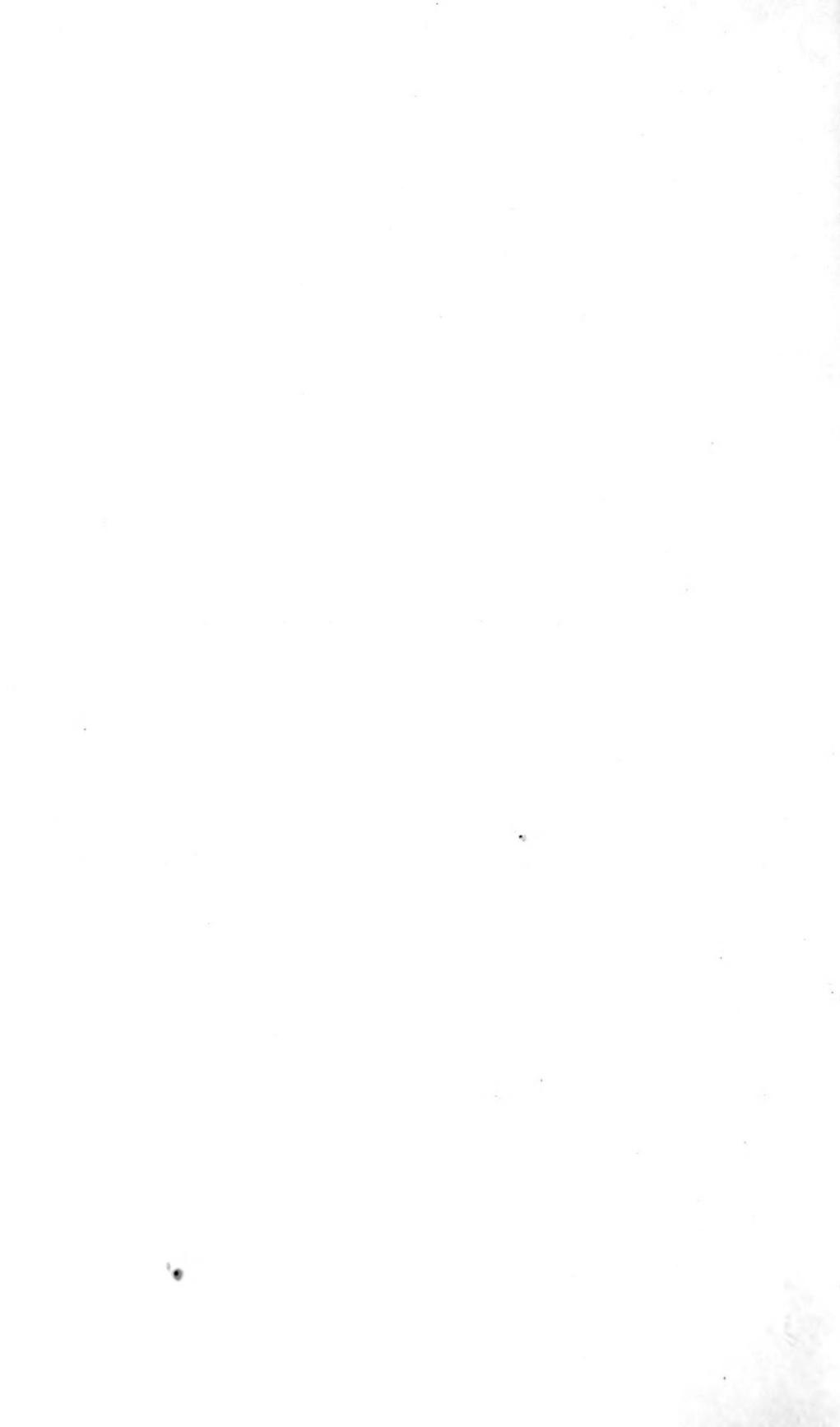
My humble thanks are due to those authors whom I had occasion to consult from time to time, and to whom I have referred in foot-notes.

Calcutta : }
December 31, 1914. }
AUTHOR.

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LIST OF ABBREVIATIONS.

A. C. (preceded by date) ...	Law Reports, Appeal Cases since 1890.
Ad. & El. ...	Adolphus and Ellis' Reports.
All. ...	Indian Law Reports, Allahabad Series.
A. L. J. ...	Allahabad Law Journal
Amb. ...	Ambler's Reports.
And. ...	Anderson's Reports.
App. Cas. ...	Law Reports, Appeal Cases.
Atk. ...	Atkyn's Reports.
A. W. N. ...	Allahabad Weekly Notes.
B. & Ad. ...	Barnewall and Adolphus' Reports.
B. & Ald. ...	Barnewall and Alderson's Reports.
B. & C. ...	Barnewall and Cresswell's Reports.
B. L. R. ...	Bengal Law Reports.
Beav. ...	Beavan's Reports.
Bing. ...	Bingham's Reports.
Bom. ...	Indian Law Reports, Bombay Series.
Bom. H. C. ...	Bombay High Court Reports.
Bom. L. R. ...	Bombay Law Reporter.
Bur. ...	Burrow's Reports.
C. A. ...	Court of Appeal.
C. B. ...	Common Bench Reports.
C. L. J. ...	Calcutta Law Journal.
C. L. R. ...	Calcutta Law Reports.
C. P. D. ...	Law Reports, Common Pleas Division.
C. W. N. ...	Calcutta Weekly Notes.
C. & P. ...	Carrington and Payne's Reports.
Cab. & El. ...	Cababe and Ellis's Reports.
Cal. ...	Indian Law Reports, Calcutta Series.
Car. & M. ...	Carrington and Marshman's Reports.
Ch. (preceded by date) ...	Law Reports, Chancery Division.
Ch. App. ...	Law Reports, Chancery Appeals.
Ch. D. ...	Law Reports, Chancery Division.
Cl. & Fin. ...	Clark and Finnelly's Reports.
Com. ...	Comyn's Reports.
Cowp. ...	Cowper's Reports.
Cr. & Ph. ...	Craig and Phillip's Reports.
Eq. Rep. ...	Equity Reports.
Esp. ...	Espinasse's Reports.
Exch. ...	Exchequer Reports.
Ex. D. ...	Law Reports, Exchequer Division.
Gal. & Dav. ...	Gale and Davison's Reports.
Gale ...	Gale's Reports.

Hem. & M.	...	Hemming and Miller's Reports.
H. L. Cas.	...	Clark's Reports, House of Lords.
Hy. Bl.	...	Henry Blackstone's Reports.
I. R. Eq.	...	Irish Reports, Equity.
Ind. Cas.	...	Indian Cases.
Jo. & Lat.	...	Jones and La Touche's Reports.
Jur.	...	Jurist Reports.
K. B. (preceded by date)	...	Law Reports, King's Bench Division.
L. J. Ch.	...	Law Journal, Chancery.
L. J. C. P.	...	Law Journal, Common Pleas.
L. J. Ex.	...	Law Journal, Exchequer.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench.
L. J. M. C.	...	Law Journal, Magistrate's Cases.
L. R. C. P.	...	Law Reports, Common Pleas.
L. R. Eq.	...	Law Reports, Equity Cases.
L. R. Ex.	...	Law Reports, Exchequer.
L. R. H. L.	...	Law Reports, House of Lords.
L. R. Ir.	...	Law Reports (Ireland.)
L. R. P. C.	...	Law Reports, Privy Council.
L. R. Q. B.	...	Law Reports, Queen's Bench.
L. T.	...	Law Times Reports.
M. L. J.	...	Madras Law Journal.
M. & S.	...	Maule and Selwyn's Reports.
M. W. N.	...	Madras Weekly Notes.
Macq.	...	Macqueen's Reports.
Mad.	...	Indian Law Reports, Madras Series.
Mad. H. C.	...	Madras High Court Reports.
Man. & G.	...	Manning and Granger's Reports.
Mod. Rep.	...	Modern Reports.
Moo.	...	Moore's Indian Appeals.
Mood. & R.	...	Moody and Robinson's Reports.
P. C.	...	Privy Council.
Q. B.	...	Queen's Bench Reports.
Q. B. (preceded by date)	...	Law Reports, Queen's Bench.
Q. P. D.	...	Law Reports, Queen's Bench Division.
R. R.	...	Revised Reports.
Sch. & Lef.	...	Schoales and Lefroy's Reports.
T. L. R.	...	The Times' Law Reports.
Tatn.	...	Tatlyn's Reports.
Taunut	...	Taunton's Reports.
Term Rep.	...	Term Reports.
Ves.	...	Vesey Jun's Reports.
Ves. & B.	...	Vesey and Beames' Reports.
W. N. (preceded by date)	...	Law Reports, Weekly Notes.
W. R.	...	Sutherland's Weekly Reporter.

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TAGORE LAW LECTURES, 1913

Compulsory Sales in British India.

COMPULSORY SALES

IN

BRITISH INDIA.

LECTURE I.

Introduction—General Principles.

A "Sale" is a transfer of ownership of property from its owner to another in exchange for a fixed price which is money and is thus distinguished from an "Exchange" which includes the notion of money.¹ A sale is either voluntary or involuntary. A "Voluntary Sale" is a transfer effected by the *owner* of the property with *his free consent* in favour of another person chosen by *himself* and on terms *mutually agreed*, the price being immediately paid or promised or part paid and part promised.² An "Involuntary" or "Compulsory" sale is a transfer effected without any contract with the real owner of the property, but by *Court* which, acting under *statutory power* conferred on it, represents the owner, and, acting as the vendor, transfers *his* property to another without *his* consent and irrespective of *his* willingness or unwillingness to part with it; the *purchaser*, the *price* and the *terms* of sale are determined without *his* consent or approval and without any reference to *him* and even in the teeth of *his* opposition:—in cases of lands required for public purposes by merely *offering* the owner the market-value of the lands taken, together with 15 p.c. on the market-value "in consideration of the compulsory nature of the acquisition" and in other cases by open competition among the bidders at an auction in which the public are invited to bid.³

But all sales, effected by Court or by private persons with or without the intervention of Court but without the owner's consent, are not necessarily compulsory sales. Indeed, there is no real distinction

Sale, voluntary and involuntary.

Sale by a mortgagee is not a compulsory sale.

1. S. 118 T. P. Act IV of 1882; see Queen v. Appava 9 Mad. 111; Kedar Nath v. Emperor 30 Cal. 921; 7 C. W. N. 701; Madhavrao v. Kashibai 34 Bom. 287.

2. S. 54 T. P. Act IV of 1882; Ss. 77, 78 I. C. Act IX of 1872.
3. S. 23 L. A. Act I of 1894; Baroda Kanta v. Chunder Kanta 29 Cal. 682; 6 C. W. N. 706.

LECTURE I.

between the sale which takes place in execution of a money-decree and the sale which takes place in execution of a mortgage-decree by reason of the order for sale in the one case being distinct from the decree, and in the other being part of the decree itself.⁴ But a sale, effected by a mortgagee of the mortgaged property, either in execution of a mortgage-decree through Court under O. 34, r.r. 5 and 8, C. P. C. Act V of 1908, or under S. 69 T. P. Act IV of 1882 and Ss. 6-19 of the Trustees' and Mortgagees' Act XXVIII of 1866 without the intervention of the Court, both being founded on the lien or charge on the premises created by the contract of mortgage, cannot *properly* be regarded as a *compulsory* sale, for in a mortgage the interest created by the mortgagor in favour of the mortgagee is the right without the concurrence of the mortgagor to cause the mortgaged property to be sold which is one of the species of *jura in re aliena* or estates carved out of the full ownership of the property, the mortgagee having the legal estate and the mortgagor merely the equitable estate in the mortgaged premises. The right of sale is one of the component rights of ownership and may be parted with separately in order thus to add security to a personal obligation. When so parted with, it is a right of pledge which may be defined as a right *in rem* realizable by sale given to a creditor by way of accessory security to a right *in personam*.⁵

Similarly, the sale by the pawnee in exercise of his right, on default of the pawnier to perform the contract within the stipulated time, to sell the thing pledged on giving the pawnier reasonable notice of the sale, being based on an implied contract, is not a *compulsory* sale.⁶ "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation and enables the pledgee in possession (though he has not the general property in the thing pledged but a special property only) to sell on default in payment and after notice to the pledger, although the pledger may redeem at any moment up to sale."⁷ An express contract is proved by direct evidence; an implied contract by circumstantial evidence.

4. Mukhoda Dasi v. Gopal Chunder 26 Cal. 731; 3 C. W. N. 766; Kudratullah v. Kubra Begam 23 All. 25; Kannilla v. Chander Sen 22 All. 377; Shivalal v. Shambhu Prasad 29 Bom. 435.

5. Holland's Jurisprudence 152. See Gopal v. Parsotam 5 All. 121; Sheora-

tan v. Mahipal 7 All. 258; Daya Chand v. Hem Chander 4 Bom. 515.

6. S. 176 I. C. Act IX of 1872.

7. Per Cotton, L. J., in Ex parte Official Receiver; *in re Morritt* 1886, 18 Q. B. 222 at p. 232.

But whether the contract is proved by evidence direct or circumstantial, the legal consequence resulting from the breach of it must be the same. "I cannot think there can be any difference as to the consequence resulting from a breach of contract by reason of that contract being either express or implied."⁸

The sales by persons having a charge on immoveable property of another under S. 100 T.P. Act IV of 1882 or a lien on the goods in their possession, such as a seller for the unpaid purchase-money under S. 107, a finder of goods for his lawful charges under section 169, or a bailee for his dues under Ss. 170, 171, I.C. Act IX of 1872, are based on similar contracts.

Nor, are the sales effected by limited or apparent owners to pass the interests of persons having present, future or contingent interest in the properties sold without the latter's consent or approval, compulsory sales. Thus, the sales by a Hindu widow for religious or charitable purposes and for legal necessity, by a Mitakshara father for his own debts, provided they are free from any taint of immorality, by a manager of a Mitakshara family for family necessity, by a natural guardian for the benefit of the minor, by an executor authorized by the terms of the will for administration of the estate of the deceased, by the Mutwallees for necessity and with the permission of the Kazi under the Mahomedan regime but now of the Civil Court of superior jurisdiction in the district,⁹ are not *compulsory* sales, for in these sales the *terms* of the sales are settled by *express contract* with the *vendors*, i.e., the persons who for the time fully represent the estate, and if the alleged circumstances exist or if the purchasers, after using reasonable care to ascertain the existence of such circumstances, act in good faith, their title is not affected.¹⁰

Similarly, the sales by a certificated guardian of a minor, by an executor, if restricted by the terms of the will, by an administrator, by a receiver or by an assignee in bankruptcy or insolvency, are not strictly *compulsory* sales, for though they are made with the previous sanction of the Court and are subject to its approval, they are really sales by *de facto* owners who, to all intents and purposes, fully represent, for the time being, the real owners.

nor by limited owners,

nor with the
Court's per-
mission,

8. Per Lord Tenterden, C.J., in *Martzetti v. Williams* (1839), 1 B. & Ad. 415 at p. 423.

C. W. N. 158 : *Nimai Chand v. Golam Hossein* 37 Cal. 179 ; *in re Halima Khatun* 37 Cal. 570.

9. *Shama Churn v. Abdul Kabeer* 3

10. S. 35 T. P. Act IV of 1882

LECTURE I.
nor by right
of pre-emp-
tion,

Nor, can a pre-emption sale be properly called a *compulsory* sale. The right of pre-emption, founded on the inconvenience arising from the introduction of strangers as co-sharers on minute divisions and subdivisions of an ancestral property of a Mahomedan family, is a right which the owner of certain immoveable property possesses as such for the quiet enjoyment of that immoveable property, to acquire, by compulsory purchase, immoveable property of another in preference to all others on tender of the price agreed upon.¹¹ It was an institution known to Roman Law and sanctioned by the obligatory relation between the vendor and a person determined, binding the vendor to sell to that person if he offered as good condition as the intended vendee.¹² It is a right to step into the shoes of a less qualified vendee or transferee, "a mere right of repurchase not from the vendor but from the vendee who is treated for all intents and purposes as the full owner of the property which is the subject matter of that right."¹³ The sale is therefore not *forced upon* an unwilling vendor; indeed the *price* and the *terms* are determined by a contract with *him*: it is merely the *substitution* of one purchaser for another.

nor in en-
forcement of
equitable
rights.

Nor, can the sale be strictly called a compulsory sale which is effected in enforcement of any equitable right. Thus, when the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction to sell his interest in the property to the transferee at the then market value thereof, irrespective of such improvement, for though the sale is forced upon an unwilling vendor, it stands on the same footing as a sale in enforcement of a contract of sale.¹⁴

A "Compulsory Sale" then is a sale which is *forced* upon an *unwilling* vendor and in which neither the *purchaser* is a man of *his* choice nor the *terms* of the sale including the *price* are fixed by any *contract* with *him*, the sale being ordered by Court, conducted by its officer and subject to its approval before being treated as final; the

11. Sir Roland Wilson's Anglo Muhammedan Law 75; Gobind Dayal v. Inayatullah 7 All. 775.

12. Per Holway, J. in Ibrahim v. Mubi Mir 6 Mad. H. C. 26.

13. Per Peacock, C. J., in Koodratoolah v. Mohini 13 W. R. 21 F. B.; 4 B. L. R. F. B. 131; see also Abdur Razzaq v. Mumtaz Husain 25 All. 331.

14. S. 51 T. P. Act IV of 1882.

Compulsory
Sale defined.

owner's right is confined merely to the *sale-proceeds* and to have the sale *set aside* on the ground that the purchaser is a person disqualified to buy or on the ground that the Court had no jurisdiction to order sale, or on the ground of any irregularity or fraud in publishing or conducting the sale, provided that in the last case he had sustained substantial injury by reason of such irregularity or fraud and also to recover damages, if any, sustained by him either on the re-sale on account of the purchaser's default or on any other ground.

But although a sale may have all the appearance of a compulsory sale, it may be, in its essence, when stripped off all disguises, a private alienation, a fraudulent use of the provisions of the statute for effecting a fraudulent purpose, as when a sale is brought about by fraud or breach of duty. Thus, where the purchaser was settled from before the sale and the price was also fixed beforehand which was put so high as to make it practically sure that no stranger would offer a bid to that extent, while there was further a secret arrangement between the owner and the purchaser which was a device, a part of the machinery, as it were, to effect a fraud as to the mode in which under-leases were to be got rid of and the profits of the transaction were to be divided, the sale was in substance a private transfer under pre-arranged conditions to a purchaser who was a party to the arrangement. Such a fictitious sale will not clothe a purchaser with a statutory title created in a compulsory sale.¹⁵ Similarly, where a decree-holder in collusion with a *benamdar* purchased a *darputni* tenure in execution of a fraudulent decree against the latter, it was held that what the Court purported to sell was nothing more than the *benami* interest and the title of the true owner was not affected by the sale under order of the Court, unless he was estopped from denying the authority of his *benamdar* to deal with it.¹⁶ So, at a sale for arrears of revenue under the B. L. R. S. Act XI of 1859, although the Collector is bound to sell to the highest bidder, even if he be the person in arrear and the default has been purposely made,¹⁷ the purchaser, will not acquire the estate free from incumbrances at the time of sale.¹⁸ Nor, can one of the defaulters purchasing a tenure

Apparent
compulsory
sales.

15. Harendra. Lall v. Salimullah 12 C. L. J. 336; Sidhee Nazur Ally v. Oojoondhyaram 10 Moo. 540; 5 W. R. 83 P. C.; Sree Nath v. Hur Nath 18 W. R. 240; 9 B. L. R. 220.

16. Annada Pershad v. Prasannamoyi 34 I. A. 138; 31 Cal. 711; 11 C. W. N.

817; 6 C. L. J. 17.

17. Cornell v. Uody Tara 8 W. R. 372; Neynum v. Muzaffur 11 W. R. 265; Doorga Sing v. Sheo Persad 16 Cal. 194.

18. Gonesh Persad v. Brij Behary I. C. L. J. 565.

LECTURE I.

at a sale for arrears of rent under Reg. VIII of 1819 or B. T. Act VIII of 1885 avoid incumbrances.¹⁹ Nor, can a mortgagor or a mortgagee in possession of the mortgaged property being bound to pay rent and revenue under Ss. 65 and 76 T. P. Act IV of 1882 respectively, get rid of the other's right by a purchase at the sale brought about by non-payment of rent or revenue.²⁰

Different kinds of compulsory sales :—

Speaking broadly, compulsory sales in British India may be divided into two principal classes ; viz., executive and judicial sales. The executive sales are generally summary sales carried on by the Collectors for public or fiscal purposes ; the judicial sales are sales directed by Civil Courts in execution of decrees or orders to satisfy the claims of private individuals.

i. Sales for public purposes.

“The advantage to the community outweighs the injury to the individual.”²¹ Hence, the sovereign power of every state having regard to proper safe-guards for the protection of private interests, has authority to appropriate lands belonging to private individuals, situate within the limits of its territorial jurisdiction, for the public safety or utility or for promoting important public interests of such paramount importance that private interests may justifiably be subordinated, for it is “better that an individual should suffer an injury than that the public should suffer an inconvenience.”²² The right to compensation is the sole remedy of the land-owner and he has no option to repudiate this right to compensation and to recover the land.²³ But such an arbitrary exercise of power is indulged with caution, so as not to interfere with security in the enjoyment of private property, nor to sacrifice private interests to a greater extent than is absolutely necessary to secure a public object of adequate importance, nor is it deemed politic to confiscate private property for public purposes without paying the owner compensation for “injury

19. Syed Nawab Ali v. Hemanta Kumari 8 C. W. N. 117; Mafizuddin v. Korbad Ali 31 Cal. 393; 8 C. W. N. 115; Fakir Chunder v. Ram Kumar 31 I. A. 195; 31 Cal. 901; 8 C. W. N. 721.

20. Sanagapally v. Intoory 26 Mad. 385; Jayanti v. Yerubandi 7 Mad. 111; Kadappa v. Shivaya 20 Bom. 492.

21. Per Grove, J., in Henwood v. Harrison (1872) L. R. 7 C. P. 606 at p. 613.

22. Per Ashhurst, J., in Russel v. Mayor of Devon (1788) 1 Term, Rep. 673.

23. Per Cairns, L. C., in Tiverton and N. D. Rail Co. v. Loosemore (1881) 9 App. Cas. 180 at p. 491; 53 L. J. Ch. 812; Bhandi Singh v. Ramadhin Rai 10 C. W. N. 991; 2 C. L. J. 359; B. I. S. N. Co. v. Sec. of State 38 Cal. 230; 15 C. W. N. 87; 12 C. L. J. 505; Manthuravadi v. Sec. of State 27 Mad. 535.

occasioned by what is legalized by the legislature.”²⁴ Thus, whenever it appears to the Local Government that any particular land is required for a public purpose or for a company, a declaration to that effect shall be made and published in the Official Gazette stating the purpose for which the land is required.²⁵ The declaration shall be conclusive evidence that the land is needed for a public purpose or for a company as the case may be and S. 6 of the Act constitutes the Government, as the custodian of the public interests, the sole judge of whether the land is required for the construction of some work, not necessarily of a permanent character, which is likely to be conducive to the promotion of public health, safety, convenience or education,²⁶ and it is not competent to the Court to assume jurisdiction to impose restrictions on what is left to the absolute discretion of the Local Government and to say that the acquisition has been *ultra vires*,²⁷ provided only that the land is taken *bona fide* with the object of using it for a public purpose “and not for any sinister or collateral purpose.”²⁸

Similar to this, is the right of the landlord on the certificate of the Collector and on making full compensation to the tenant to acquire a holding or part thereof “for some reasonable and sufficient purpose having relation to the good of the holding or of the estate in which it is comprised, including the use of the ground as building ground or for any religious, educational or charitable purpose.”²⁹

The right of the creditor to sell his debtor's property for the realization of his dues is a very ancient right existing from the remotest time in the jurisprudence of all nations, ancient and modern. Thus, Brihaspati says :—“ When the debt is doubled by the interest and the debtor is either dead or has absconded, the creditor may attach his pledge or the debtor's chattel and sell it before witnesses ; or having appraised it in an assembly of good men, he may keep it ten days, after which having received the amount of his debt he

ii. Sales in execution of decrees.

24. Blackburn, J., in Queen v. Lord Mayor of London (1867) L. R. 2 Q. B. 292; Kamizi Debi v. Praimatha Nath 39 Cal. 33; 13 C. L. J. 597; 10 Ind. Cas. 491.

25. S. 6 L. A. Act I. of 1894.

26. Rau Chandra v. Ahmedabad Municipality 24 Bom. 609.

27. Ezra v. Sec. of State 30 Cal. 36; 7 C. W. N. 219; Roghu Nath v. Coll. of Dacca 11 C. L. J. 612.

28. Per Lord Cranworth, L. C., in S. and D. Rail & Co. v. Brown (1860) 9 H. L. Cas. 215.

29. S. 34 B. T. Act VIII of 1885.

LECTURE I. must relinquish the balance, if there be any..... When the pawnor is missing let the creditor produce his pledge before the king; it may then be sold with his permission.³⁰

The only way of compelling satisfaction of a judgment-debt, known to the early Roman law, was to seize the debtor as a slave, the execution, though an act of private vengeance, was regulated and controlled by the Praetor. The first attempt of the Praetor to get directly at the debtor's property was in the case of those that fraudulently evaded the process of the Court and his mode of procedure was by making the debtor a bankrupt which entailed the loss of his political rights, the debtor becoming infamous. At length, in the time of the Emperor Antoninus Pius, judgment-debts were enforced directly by the seizure and sale of the debtor's goods by public officials.³¹

When any person in British India has obtained a decree or order for payment of money, including a decree for the balance due on a mortgage against another for any debt, demand, rent, damages or costs, the amount can be recovered by attachment and sale of the property of the person against whom the decree has been passed.³²

iii. Sales in
lieu of parti-
tion.

Whenever in a suit for partition, it appears to the Court that a partition of the property cannot be made without destroying its intrinsic value and that a sale of the property and distribution of the proceeds will be more beneficial to the shareholders than a division, the Court may direct a sale of the property or a portion thereof.³³ "It is an absolute power of sale on the request of any body, provided the Court is satisfied that it would be more beneficial for the parties interested than a division."³⁴ But the benefit must be of a pecuniary and not of a merely sentimental character, and when it appears that a vindictive feeling has brought about the action, a sale will be refused.³⁵ In a suit for partition of the family-dwelling-house, if the plaintiff is a transferee of a portion and stranger to the family, and any member of the family undertake to buy such share at a valuation made by the Court, the Court shall direct the sale of such

30. 1 Cole, Dig. p. 141, Book I. Ch. III S. 5 cl. 122.

31. Hunter's Roman Law, Book IV pt. III.

32. S. 36, O. 21, r. 30, O. 34 r. 6 C. P. C. Act V of 1908.

33. Ss. 2 and 9 Partition Act IV of 1893.

34. Per Jessel, M. R., in Drinkwater v. Ratcliffe (1875) L. R. 20 Eq. 528.

35. Saxton v. Bartley (1879) 27 W. R. 615; 48 L. J. Ch. 519.

share to such shareholder.³⁶ Indeed, it is inequitable to permit a stranger to intrude himself upon the privacy of a joint family-residence, more particularly when, as happens in many instances, a stranger is actuated by motives of enmity.³⁷

The necessity for speedy realization of public revenue requires that the Collector of revenue should be armed with summary power to recover the Government dues from the persons liable to pay them. The relation between the Government and the holders of estates paying revenue, stands on an entirely different footing from that on which the relation between creditors and debtors is based.³⁸ Accordingly, when the Government revenue, whether land tax, income tax or any other tax is in arrear, the Collector is authorized to realize the money by summary sale of the estate in arrear or any property of the defaulter. Similarly, if the tax, expenses or charges recoverable under the B. M. Act III (B.C.) of 1884 is due in respect of any holding from its owner, and if the owner, is unknown or the ownership thereof is disputed, the Commissioners may, under S. 361 of the Act, after giving proper notice, summarily sell such holding.

When a certificate of the amount of any public demands has been made by a Certificate Officer and served on the person in arrear, the certificate under the P. D. R. Act III (B. C.) of 1913 has the force and effect of a decree and, if not cancelled, binds his immoveable property, situated within the jurisdiction of the District Collector in the same manner and with like effect, as if such immoveable property had been attached under the Civil Procedure Code, and it may be enforced and executed as a decree for money by the sale of the property.³⁹ Similarly, arrear of rent due to a landlord, if authorized by the Local Government, may be recovered by the same summary procedure.⁴⁰

In Bengal, when the rent of a Putni Taluk or other saleable tenure or under-tenure for the expired or the current year is due to the zemindar or proprietor under direct engagement with the Government, i.e. whose name is registered under the L. R. Act VII (B. C.) of 1876

iv. Sales for arrears of revenue.

v. Sales for arrears of public demands.

vi. Sales for arrears of rent.

36. S. 4 Partition Act IV of 1893.

413; 13 C. L. J. 525; Jogendra Mohan

37. Kshirode Chunder v. Saroda

v. Uma Nath 35 Cal. 636; 12 C. W. N.

Prasad 12 C. L. J. 525; Debendra Nath

646; 8 C. L. J. 41.

v. Haridas 15 C. W. N. 552; 13 C. L. J.

322.

38. Mahomed Jan v. Ganga Bishun

39. Nanda Kumar v. Ajodhya Saha 14

38 I. A. 80; 38 Cal. 537; 15 C. W. N.

C. L. J. 292.

40. S. 158A P.T. Act VIII of 1885.

LECTURE I. and whose right of selling or bringing to sale for the arrear of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure or under-tenure, or who has acquired the right of causing such sale to be made under any summary process authorized by law, the Collector of Land Revenue is authorized, under certain conditions, to recover the amount of the arrear by summary sale of the taluk in the months of Jaista and Kartick respectively.⁴¹

vii. Sales
by distress.

Distress is a summary remedy by which a person in order to minister redress to himself is entitled without legal process to take into his possession the personal chattel of another person, to be held as a pledge to compel the satisfaction of a debt or demand or the payment of damages or the performance of a duty. It enables the landlord to secure the payment of rent due to him by seizing the crops standing upon the premises, in respect of which the rent is due, and the executive and other public bodies to enforce the payment of fines and penalties and rates and taxes and the Court to compel the performance of a legal obligation. Thus, when the rent of a holding has not been due for more than a year and no security has been accepted therefor by the landlord it may be recovered by distraining the crops standing on the holding.⁴² When a fine has been imposed for an offence, or for contempt or for any other reason, or when a bond has been forfeited, the Court can realize the fine or forfeiture by attachment and sale of the properties of the person who has been fined or whose bond has been forfeited.⁴³ Distress is a device made by the Legislature to enable a Court, as ancillary to its jurisdiction, to enforce its own orders. Thus, when the Court has ordered the attendance of a person, either as an accused person or as a witness, and the person has absconded, it may order the attachment of his moveables to enforce his attendance, and then if he do not appear, it can sell the attached property.⁴⁴ Again, when the Court has passed a decree for specific moveable or for specific performance of a contract, or for restitution of conjugal rights, or for

41. S. 9 Reg. VIII of 1819, S. 2 Reg. I. of 1820.

42. Ss. 121–142 B. T. Act VIII of 1855; Ss. 112–145 Rent Recovery Act X of 1859; Ss. 129–146 N. W. P. Tenancy Act XII of 1881; Ss. 72–107 Oudh Rent Act XXII of 1886.

43. Ss. 386, 387, 514, 547 Cr. P. C. Act V of 1898; O. 16 r.r. 10, 12, 13, 16, 17 C. P. C. Act V of 1908.

44. Ss. 87, 88, 89 Cr. P. C. Act V of 1898; O. 16 r.r. 12, 13, 17 C. P. C. Act V of 1908.

an injunction, and the person against whom it has been passed has wilfully disobeyed, the decree may be executed by attachment and sale of his property and by paying compensation to the person aggrieved.⁴⁵

As the object of compulsory sales is not to cause any pecuniary loss to the owners but to secure the best prices that can be fairly obtained for the properties, they are generally effected by public auction in which the public are invited to bid, and conducted by such persons as the Court may appoint. With the same object in view, the sale of a negotiable instrument or a share of a corporation may be made through a broker.⁴⁶

Sales should
be by public
auction.

Although an officer having any statutory duty to perform in connection with the sale, is not answerable for any error, misstatement, or omission, unless the same has been made dishonestly, yet an innocent person should not be made to suffer for it. Thus, the Certificate Officer under the P.D.R. Act III (B. C.) of 1913 has authority to sell only so long as the certificate remains unpaid, and upon the arrear being paid into the treasury, it becomes the statutory duty of the Collector to enter satisfaction upon the certificate under his hand and signature. "It would be a singular result if a Collector's neglect of his statutory duty gave him statutory power to sell in execution the property of a person who owed nothing to the Government."⁴⁷

Court's duty
to be fair and
scrupulous.

The Court is bound to take special care that there shall be nothing in the conditions or in the representations therein contained which by possibility can mislead a purchaser. The Court is the vendor and it will not enforce a contract in its own favour of which it would refuse execution if the vendor were a private person. There must therefore be at least as much good faith shown towards the purchaser, and perhaps a little more than is required from ordinary vendors out of Court, "because a purchaser has a right to assume that the Court will take very good care that there shall be nothing that can in any way mislead him as to the title he is getting."⁴⁸

45. O. 21 r. r. 31, 32; O. 39 r. 2 C. P. C. Act V of 1908.

46. O. 21 r. 76 C. P. C. Act V of 1908.

47. Mahomed Abdul Hai v. Gujraj Sahai 20 I. A. 70; 29 Cal. 826. See also Janakdhari v. Gossain 37 Cal. 107; 13 C. W. N. 710; 11 C. L. J. 254.

48. Per Cotton, L. J., in re. Banister, Broad v. Munton (1879) 12 Ch. D. 131 at p. 150; Else v. Else (1872) 13 Eq. 196; in re. Arnold (1880) 14 Ch. D. 273; Malkarjun v. Narhari 27 I. A. 216; 25 Bom. 337; 5 C. W. N. 10; 10 Mad. L. J. 365.

LECTURE I.

Thus, where a bid was made under a misapprehension, caused by a misrepresentation of the auctioneer within the meaning of S. 18 cl. (3) I. C. Act IX of 1872, and the purchaser, whose consent was so caused, had the means of discovering the truth with ordinary diligence, the contract would not under S. 19, Exception, have been voidable, if the question had arisen between outsiders and if the Court had no concern in the matter beyond the duty of exercising its judicial functions. But in a Court-sale that exception has no application. "It has been laid down again and again that in sales under the direction of the Court, it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honor of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce, against a purchaser, misled by its duly accredited agents, a bargain so illusory and so unconscientious as this."⁴⁹

B.L.R.S. Act XI of 1859 does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. Thus, where the Board of Revenue sanctioned a reduction of the revenue, annually payable for 5 annas share of certain estate, but the Collector erroneously entered in his books the abatement of revenue as applicable to another estate and the result was that the Collector sold the estate for arrears of revenue, the Judicial Committee observed:—"In their opinion a stupid blunder made by the Collector or his staff in his own books cannot deprive the appellants of their right to claim and have effect given to the permanent abatement which was allowed by the Board of Revenue in March 1884. The result is that the whole proceedings of the Collector with a view to the sale of 5 annas share were beyond his jurisdiction and are entitled to the protection given by the Act in cases where sale is authorized, although it may be attended with some irregularity or illegality."⁵⁰

49. Per Lord Macnaghten, in *Kala Mea v. Harperink* 36 I. A. 32; 36 Cal. 323; 13 C. W. N. 249; 9 C. L. J. 165.

50. *Balkishen v. Simpson* 25 I. A. 151; 25 Cal. 833; 2 C. W. N. 513.

Compulsory sale is not enforced where it may be oppressive or may cause hardship, injustice or unnecessary trouble and vexation to the owner. Thus, the necessary wearing apparel or such personal ornaments, as in accordance with religious usage cannot be parted with by any woman, or the tools of artizans or the houses and implements of husbandry of an agriculturist, cannot be attached and sold in execution of a money-decree although the same can be voluntarily sold by the owner.⁵¹ A Hindu husband has absolute control over his wife's ornaments but a creditor of his cannot sell them in execution of a decree against him.⁵² In the Punjab, land belonging to a member of an agricultural tribe, cannot be sold in execution of any decree or order of any Civil or Revenue Court.⁵³ A portion of property cannot be sold in execution of a decree.⁵⁴ Nor, can a putni be sold in piecemeal.⁵⁵ Nor, can a part of any house, manufactory or other building be acquired for public purposes without the consent of the owner.⁵⁶

Nor, can a compulsory sale be effected when it is opposed to public policy. According to Hindu Law, private alienations of religious endowment are not absolutely prohibited. Compulsory sales, however, of such property by way of sales in execution of decrees have been disallowed as being opposed both to Hindu Law and public policy, for such compulsory sales might transfer such property to persons disqualified to perform the duties of the office.⁵⁷ Although property, in the hands of a receiver who may, by a fiction of law, be deemed to be the right arm of the Court exercising jurisdiction for the benefit of all parties,⁵⁸ can be sold in execution of mortgage decree, neither attachment nor interference with his possession being necessary in such a case,⁵⁹ it cannot be sold in execution of a money-decree against the owner ; for when a receiver has been appointed

LECTURE I.

Restrictions
on compul-
sory sales :—

i. Hardship.

ii. Public
policy.

51. S. 60 C. P. C. Act V of 1908.

52. Tukaram v. Gunaji 8 Bom. H. C. A. C. J. 129 ; Appana v. Tangamma 9 Bom. 106.

53. S. 16 Punjab Alienation of Land Act XIII of 1900.

54. Peru Bepari v. Ronuo Maifarash 11 Cal. 164 ; Purushottama v. Municipal Council of Bellary 14 Mad. 467 ; Reily v. Hur Chunder 9 Cal. 772 : 12 C. L. R. 398.

55. Cowell v. Mohadeb 17 W. R. 182.

56. S. 49 L. A. Act I. of 1894.

57. Rajaram v. Gonesh 23 Bom. 131 ; Dubo v. Srinibas 5 B. L. R. 617 ; Kalee Churn v. Bungshee 15 W. R. 339 ; Malika v. Ratammoni 1 C. W. N. 493 ; Govind v. Ram Krishna 12 Bom. 366 ; Durga v. Chanchal 4 All. 81.

58. Harihar v. Harendra 37 Cal. 754 ; 12 C. L. J. 252 ; Jagat Tarini v. Naba Gopal 34 Cal. 305 ; 5 C. L. J. 270.

59. Jogendra v. Debendra 26 Cal. 127 : 3 C. W. N. 90.

LECTURE I. the property is in the custody of the Court through its receiver as a fund abiding the result of the pending suit and all proceedings affecting such fund should be under its control. Hence, an attachment and a sale of such property without leave of such Court is illegal, for if a contrary view were maintained, the very object of the appointment of a receiver to preserve the property for equal benefit of those equally interested in its distribution, might be defeated; the whole fund might pass out of the hands of the Court before the final decree and the litigation would thus become fruitless.⁶⁰ Similarly, property in the hands of the Official Assignee or Liquidator appointed by a Court, or in respect of which a vesting order has been made or of an undischarged insolvent, cannot be sold in execution of a decree against the owner. Again, an executor or administrator represents for all purposes the estate of the testator or the intestate respectively, and can sell the estate of the deceased or any part of it for the proper administration of the estate, yet it cannot be sold in execution of a personal decree against him or the heir or the legatee until the estate has been fully administered.⁶¹ So, no immoveable property under the superintendence of the Court of Wards is liable to sale on account of arrears of land revenue accruing, while such estate is under the superintendence of the Court of Wards.⁶²

Exception.

Although a non-transferable occupancy right, which is a right merely personal to the tenant, cannot be sold by the tenant without the consent of the landlord⁶³ or in execution of a money-decree against him,⁶⁴ it can be sold by the landlord in execution of a rent-decree.⁶⁵ Since 1903, the right of a raiyat in his holding in Chota Nagpur cannot be sold in execution of any decree or order except in execution of a decree for arrears of rent of the holding or under

60. Per Mookerjee J., in Levinia Ashton v. Madhabmoni 14 C. W. N. 560; 11 C. L. J. 489; see also Miller v. Ram Raujan 10 Cal. 1014; Boehem v. Goodall (1911) 1 Ch. 155; Sarat v. Apurba 15 C. W. N. 925; Jotindra v. Sarfaraj 14 C. W. N. 653; Zohru v. Zobeda 12 C. L. J. 370; Kahn v. Ali Mahomed 16 Bom. 577.

61. Fenwick v. Laycock (1841) 1 Gal.

& Dav. 532.
62. Ss. 23, 24, 25 Act IX (B. C.) of 1879; S. 65 Act I (M. C.) of 1902; S. 153 Act II (N. W. P. C.) of 1901; S. 30 Act I (Bo. C.) of 1905.
63. S. 6 T. P. Act IV of 1882.
64. Bhiram Ali v. Gopi Kant 24 Cal. 355; 1 C. W. N. 396; Peary Mohan v. Jote Kumar 11 C. W. N. 83.
65. S. 158 B.B. T. Act VIII of 1885.

the P. D. R. Act III (B.C.) of 1913.⁶⁶ Similarly, the house and other building of an agriculturist which is exempt from sale in execution of a money-decree, can be sold in execution of a decree for rent of such house or building.⁶⁷

A general restriction on assignment does not apply to an assignment by operation of law taking effect in *in rem* as a sale under an execution. Thus, a member of an undivided family governed by the Mitakshara law cannot sell his interests in the undivided property without the consent of his coparceners; but a creditor, of his can, in execution of a decree against him, sell his undivided and unascertained share so as to authorize the purchaser to have the share sold ascertained by partition.⁶⁸ A partner cannot sell his interest in the partnership "so as to introduce a stranger into the firm without the consent of his co-partners", but his creditor can obtain an order, not only charging the interest of such partnership property and its profit with payment of the decretal amount, but also for the sale of such interest⁶⁹ and "the purchaser at the execution sale acquires the interest sold with the right to have the partnership accounts taken and realize" his share in the assets of the partnership, "for if this were not so, it is clear that a person by entering into a partnership might secure for himself complete immunity as against his private creditors."⁷⁰

Restrictions
on assign-
ment.

Similarly, a lease which prohibits alienation by sale or gift can be sold in execution of a decree,⁷¹ except where there is a clause in the lease which forbids the lessee letting it be sold, attached and sold in satisfaction of judgment-debts. Sarjent, C. J., observes :—" We think that if the lessee allowed the land to be attached and sold by not taking measures to satisfy his judgment-debt there would be a breach, both according to the letter and spirit of the provision in the lease.⁷² Again, an agreement amongst

66. S. 47 Chota Nagpur Tenancy Act VI (B. C.) of 1908.

157 ; Peary v. Chandi 11 C. W. N. 163 ; 5 C. L. J. 80.

67. S. 60 Ex. 2 C. P. C. Act V of 1908.

69. O. 21 r. 49 C. P. C. Act V of 1908.

68. Deen Dyal v. Jugdeep 4 I. A. 247 ; 3 Cal. 198 ; 1 C. L. R. 49 ; Suraj Bansi v. Sheo Persad 6 I. A. 88 ; 5 Cal. 148 ; 4 C. L. R. 226 ; Maitho Parshad v. Meherban 17 I. A. 191 ; 18 Cal.

70. Jagat v. Iswar 20 Cal. 693.

71. Golak Nath v. Mathura Nath 20 Cal. 273 ; Nil Madhab v. Naratam 17 Cal. 826.

72. Vyankataraya v. Shiv Ram 7 Bom. 256.

LECTURE I.

co-sharers for a sufficient consideration to forego their rights of partition of joint property for a specified time and definite purpose can be enforced against them;⁷³ but it cannot be enforced against a purchaser at an execution-sale of the share of one of the contracting parties.⁷⁴

Safeguards
of compulsory
sales :—
Statutory
conditions
must be
strictly
fulfilled.

As compulsory sales are effected without the consent of the owners or persons having interests in them which may be affected by the sale of the properties, all statutory conditions which have been imposed as conditions precedent and intended for the protection of the interests of these persons must be strictly fulfilled.⁷⁵ The burden of proof of compliance rests upon those who claim statutory powers or base their title upon the exercise of statutory provisions⁷⁶ and if an attempt is made at merely nominal compliance with the provisions of the statute in the exercise of statutory right, the Courts have ample power to afford relief to a person who is aggrieved by the adoption of such a course.⁷⁷ These preliminaries are often necessary for the purpose of giving notice of the intending sales to the owner or other persons whose rights may be affected by the sales so as to give them opportunities either to prevent the sales, if possible, or to watch the proceedings so that they may not be prejudiced in any way by the sales being fraudulently brought about or illegally or irregularly conducted. These preliminaries are necessary for inviting claimants to prefer objections, if any, to the sales and to have their claims speedily determined and for informing the intending buyers as to what will be actually sold and securing the highest prices for the properties by open competition among bidders.

73. Ramdhun v. Anund 2 Hyde 93; Rajender v. Sham Chand 6 Cal. 106; Radha Nath v. Tairuck Nath 3 C. W. N. 126.

74. Auand v. Pran Kristo 3 B. L. R. (O. C.) 14; 11 W. R. (O. C.) 19.

75. North Shore Rail Co. v. Pion (1889) 14 App. Cas. 612; Re Doyne (1889) 21 L. R. Ir. 287; Bejoy Chand v. Atulya Charan 32 Cal. 953; 3 C. L. J. 16.

76. Rameshwari v. Sec. of State 31 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669; Maharaja of Burdwan v. Tara Sundari 10 I. A. 19; 9 Cal. 619;

13 C. I. R. 34; Maharani of Burdwan v. Krishna Kamini 11 I. A. 30; 14 Cal. 365; Bejoy Chand v. Amrita Lal 27 Cal. 308.

77. Raghu Nath v. Coll. of Dacea 11 C. L. J. 612; Luchmeswar v. Darbhanga Municipality 17 I. A. 90; 18 Cal. 99; Gaikwar v. Gandhi 30 I. A. 60; 27 Bom. 311; 7 C. W. N. 393; Rameshwari v. Sec. of State 31 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669; B. I. S. N. Co. v. Sec. of State 38 Cal. 239; 15 C. W. N. 87; 12 C. L. J. 505.

Thus, the L. A. Act I of 1894 vests the Local Government with absolute discretion in the matter of acquisition "irrespective of any consideration of the willingness or unwillingness of the owner to part with his property."⁷⁸ But it is essential to the exercise of the jurisdiction that notice inviting claimants should contain material facts to enable the land-owner to identify the land intended to be taken up and should also give the owner the time prescribed by the statute to prefer claims and objections. The principle is that no man shall have his rights determined without an opportunity being given him to be heard in his defence.⁷⁹ Hence, an entry upon the land intended to be acquired will be trespass without the notification under S. 4 of the Act or without making any award under S. 11 and giving compensation to the owner.⁸⁰

Again, sales under the B.L.R.S. Act XI of 1859, the provisions of which in the interest of the state have a character of an usual stringency, should be conducted with all possible fairness and impartiality.⁸¹ Thus, the notification of sale under S. 6 of the Act which is to inform the intending purchaser what is the precise property to be sold, must issue not less than thirty clear days before the sale. Non-compliance with this provision renders the sale null and void.⁸² Again, though the object of issuing a notice under S. 7 of the Act is to give notice to tenants and undertenants forbidding them to pay to the defaulting proprietor rent, falling due after the day fixed for the last day of payment, and the omission to issue such a notice is a mere irregularity,⁸³ the omission to issue notification under S. 5, specifying the nature and amount of the arrear or demand of the particular description mentioned in the section, the object of which

LECTURE I.

i. Notice to owners of acquisition of land for public purposes.

ii. Notice of arrear of revenue.

78. Ezra v. Sec. of State 32 I. A. 93; 32 Cal. 695; 9 C. W. N. 454; 1 C. L. J. 227.

79. Rameshwari v. Sec. of State 34 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669; B. I. S. & Co. v. Sec. of State 38 Cal. 280; 15 C. W. N. 87; 12. C. L. J. 505.

80. G. W. Rail Co. v. Swindon &c. Rail Co. (1884) 9 App. Cas. 787; Luchmeswar v. Darbhanga Municipality 17 I. A. 90; 18 Cal. 99; Gajendra v. Sec. of State 8 C. L. J. 39.

81. Halimannissa v. Sec. of State 31 Cal. 1036; 8 C. W. N. 880.

82. Hem Chunder v. Sarat Kamini 6 C. W. N. 526; Mobaruk v. Sec. of State 11 Cal. 200; Gobind Lal v. Biprodas 17 Cal. 398; Ismail Khan v. Abdul Aziz 32 Cal. 509; 9 C. W. N. 348; 1 C. L. J. 91.

83. Bhawani Koer v. Afzal Husain 34 Cal. 381; 5 C. L. J. 425; Deonandan v. Manbodh 32 Cal. 111; 8 C. W. N. 757; Bageswari Prosad v. Gowhar Ali 32 I. A. 52; 31 Cal. 256; 8 C. W. N. 649; Bishambhu v. Bonomali 26 Cal. 414; 3 C. W. N. 233; Mahomed Ago v. Jagu Nandan 10 C. W. N. 137; 2 C. L. J. 325.



LECTURE I.

is to protect the interest of the attaching creditors, renders the sale illegal.⁸⁴

iii. Notice of arrear of Putni rent.

The object of serving a notice under S. 8 of the Putni Regulation VIII of 1819, is not only to acquaint the defaulter of the impending sale but also to enable the under-tenants on the taluk to protect their own rights from the ruin that must attend the sale, by paying into Court sufficient money to meet the landlords' claim⁸⁵ and inform the intending bidders of the sale.⁸⁶ Not only is the publication of a notice in strict compliance with S. 8, cl. 2 is essential to the validity of the sale⁸⁷ but the service of notice should also be made in strict compliance with the Regulation and the zemindar is exclusively responsible for its regularity.⁸⁸ But the omission to serve notice, though it may affect the validity of the sale and render it liable to be set aside, does not render the sale a nullity.⁸⁹

iv. Issue of Certificate.

When a copy of the certificate made by a Certificate Officer is served on the debtors named in it under S. 7 P. D. R. Act III (B.C.) of 1913 to enable them to contest their liability to pay, it binds their immoveable property.⁹⁰ But if the certificate is to have the extraordinary effect of a decree against the persons named in it as debtors and to have the effect of binding their immoveable property, it should be in a form such as is provided in the Act.⁹¹ "If no such certificate is given then the whole basis of the proceeding is gone. There is no judgment, there is nothing corresponding to a judgment or decree for payment of the amount and there is no foundation for the sale. The authority to proceed to the sale is based on the certificate and if no judgment or decree is given and no certificate

84. Gonesh Pershad v. Brij Behari 1 C. L. J. 565 ; Deonandan v. Manbodh 32 Cal. 111; 8 C. W. N. 757.

85. Gouree v. Joodhishter 1 Cal. 359; 25 W. R. 141.

86. Bhugwan Chunder v. Sudder Ally 4 Cal. 41; 2 C. L. R. 357 Maharanee of Burdwan v. Krishna Kanini 14 I. A. 30; 14 Cal. 365; Asanulla v. Hari Churn 17 Cal. 474; *afid.* on appeal 19 I. A. 191; 20 Cal. 86; Niamut Ullah v. A. H. Forbes 2 C. W. N. 459.

87. Bejoy Chand v. Atulya Choran 32 Cal. 953; 3 C. L. J. 46; Raj Narain v.

Ananta Lal 19 Cal. 703; Surnomoyee v. Grish Chunder 18 Cal. 363.

88. Bhugwan Chunder v. Sudder Ally 4 Cal. 41; 2 C. L. R. 357; Maharanee of Burdwan v. Tua Sundari 10 I. A. 19; 9 Cal. 619; 13 C. L. R. 34.

89. Ramsona v. Naba Kumar 16 C. W. N. 805.

90. Hari Charan v. Chandra Kumar 35 Cal. 286, on appeal from 34 Cal. 787; 11 C. W. N. 745.

91. Purna Chandra v. Dina Bandhu 34 Cal. 811; 11 C. W. N. 756; 5 C. L. J. 696.

is filed, having the force or effect of a judgment or decree, there can be no valid sale at all."⁹²

The object of serving a notice under O. 21, r. 22 C. P. Code, Act V of 1908 is to prevent surprise and to give an opportunity to the judgment-debtor or his legal representatives to show cause why the decree should not be executed as well as to satisfy the decree before execution issues.⁹³ It is a condition precedent to the execution of the decree, and until it is issued the Court has no jurisdiction to proceed with the execution.⁹⁴

All compulsory sales must be preceded by a notification or proclamation of sale, the object of which is obviously to inform the general public of the kind and character of the property to be sold, of the time, place and terms of the sale and of the persons whose property is about to be subjected to an involuntary transfer. The property ought to be described in the manner best calculated to give notice to the public of its location, extent and character, at all events the description must be such as to enable a person of common understanding to identify the property. The omission of the time and place of sale destroys the value of the notice and a sale made in pursuance of such defective notice has no greater validity than a sale made without the publication of any notice whatever.⁹⁵

All compulsory sales which are authorized for the realization of money due from the debtor, except the Land Revenue Sales in Bengal, will be stopped when such money with all necessary costs is tendered to the officer conducting the sale, either by the owner or by any person having an interest in the property which may be affected by the sale. Although the person making the payment is entitled to recover the money from the person primarily

LECTURE I.

v. Notice of execution.

vi. Issue of proclamation.

Sales averted or postponed.

92. Baij Nath v. Ramgut Singh 23 I. A. 45; 23 Cal. 775; Gopal Das v. Haide Das 5 C. W. N. 86; Ramrup v. Khusal Misser 6 C. W. N. 630.

93. Jogendra v. Shyam Das 36 Cal. 543; 9 C. L. J. 271; Lakshmi Narain v. Sris Chandra 11 C. L. J. 162; Levinia Ashton v. Madhabmoni 14 C. W. N. 560; 11 C. L. J. 489.

94. Gopal Chunder v. Gunamoni 20 Cal. 370; Sahdeo v. Ghasiram 21 Cal. 19; Ramessuri v. Doorga Das 6 Cal. 103;

7 C. L. R. 85; Imamun-nissa v. Liakat Husain 3 All. 424; Parashram v. Bal-mukund 32 Bom. 572; Malkurjun v. Narhari 27 I. A. 216; 25 Bom. 337; 5 C. W. N. 10; on appeal from Erava v. Sidramappa 21 Bom. 424; Levinia Ashton v. Madhabmoni 14 C. W. N. 560; 11 C. L. J. 489.

95. Freeman on Executions § 285d; Aluckmouee v. Banee 4 Cal. 677; 3 C. L. R. 473; Barhamdeo v. Rasul Bandi 32 Cal. 691; 1 C. L. J. 369.

LECTURE I. liable to pay the same,⁹⁶ the money, so paid, is considered in certain cases as a loan secured by a mortgage of the property preserved from sale, and apart from any other remedy to which the person making the payment is entitled, he may obtain immediate possession of the property and retain such possession until the debt is discharged.⁹⁷ An adjournment of sale in execution of a decree will always be allowed when there is reason to believe that it will be beneficial to the judgment-debtor, or that the immediate sale is likely to be attended with ruinous or unduly injurious consequences to the judgment-debtor, and that the postponement will not seriously prejudice the decreee-holder.⁹⁸ Sales may also be stayed upon such terms as to giving security or otherwise, pending appeals against the decrees or orders directing the sales or pending suits between the same parties, pending the disposal of the appeals or suits respectively.⁹⁹ A sale may also be stayed at the instance of a third person whose claim to the attached property has been disallowed and who has instituted a suit for a declaration that the property is his and not liable to be attached and sold.¹⁰⁰ The "principle which underlies all orders for the preservation of property pending litigation, is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation and not obtain merely a barren success."¹⁰¹

Purchasers
at compulsory
sales.

As a general rule, subject to certain statutory exceptions, all persons (other than the officer conducting or interested in the sale) are permitted to become purchasers, provided they are competent to contract and do not occupy a relation with the owner of the property in which they will not be permitted to make their interests antagonistic to his. The rule of law that an agent is not deemed to

96. S. 69 I. C. Act IX of 1872; Smith v. Dinonath 12 Cal 213; Bama Sundari v. Adhar Chunder 22 Cal 28; Dakhina Mohan v. Saroda Mohan 20 I. A. 160; 21 Cal. 142; Radha Madhub v. Sasti Ram 26 Cal. 826; Chinnasamy v. Rathna Sahapathy 27 Mad. 338; Bindubashini v. Harendra Lal 25 Cal. 305; 2 C. W. N. 150.

97. S. 9 B. L. R. S. Act XI of 1859; S. 13 Putni Regulation VIII of 1819; S. 171 B. T. Act VIII of 1885.

98. O. 21 r.r. 69, 83 C. P. C. Act V

of 1905; Janookeenath v. Radha Mohun 20 W. R. 130; Sidhee Nuzur Ali v. Oojoondhyaram 10 Moo 540; 5 W. R. 83 P. C.; Bishemun v. L. M. Bank 12 I. A. 7; 11 Cal. 214.

99. O. 41 r.r. 5—7; O. 21 r. 29 C. P. C. Act V of 1908.

100. O. 39 r. 1 C. P. C. Act V of 1908.

101. Per Sir George Jessel, M. R., in Polini v. Gray (1879) L. R. 12 Ch. D. 438 quoted in Brij Coomaree v. Ramrick Dass 5 C. W. N. 781.

have authority to represent two principals, buyer and seller, whose interests are conflicting, applies with peculiar force to compulsory sales. Thus, no officer or other person having any duty to perform in connection with the sale shall either directly or indirectly bid for, acquire or attempt to acquire any interest in the property sold, nor assume any duty which would tend towards an improper exercise of his official discretion over the sale, for he should not place himself in a position in which his duty is in conflict with his interest. The officer is not allowed to unite the two opposing characters of buyer and seller, because his interests when he is the seller or buyer on his own account are directly conflicting with those of the person on whose account he buys or sells. It provides against the probability in many cases and the danger in all cases that the dictate of self-interest will exercise a predominant influence and supersede that of duty.¹⁰²

In sales for arrears of rent, the defaulting tenant cannot buy in the property sold.¹⁰³ In other compulsory sales, the owner is not prohibited from buying in the property, although he does not acquire the same right as a stranger purchasing the property. Thus, though at a sale for arrears of revenue, the Collector is bound to sell to the highest bidder, even if the bidder be the person in arrear and the default has been purposely made,¹⁰⁴ the purchaser, however, will be subject to existing incumbrances,¹⁰⁵ created by himself in the same way, as a mortgagor purchasing the mortgaged property in execution of a prior mortgage-decree cannot get it free from the subsequent incumbrances which he himself created.¹⁰⁶

Again, where cotenants are jointly liable for money for which the sale is held, a purchase of the property of the cotenancy by one of them enures to the benefit of all the cotenants and must be held by him subject to the duty of re-conveying their shares to his

LECTURE I.
i. Officers
of Court.

ii. Owner.

102. Freeman on Void Judicial Sales § 29; O 21 r. 73 C. P. C. Act V of 1908; S. 560 Cr. P. C. Act V of 1898; S. 165 N. W. P. and O. L. R. Act III of 1901.

103. S. 9, Reg. VIII of 1879; S. 173 B. T. Act VIII of 1885.

104. Cornell v. Uody Tara S. W. R. 372; Doorga Sing v. Sheo Persad 16 Cal. 194; Néynum v. Muzufur 11 W. R. 265.

105. Gonesh Pershad v. Brij Behary 1 C. L. J. 565; Mafijuddin v. Korbad Ali 31 Cal. 393; 8 C. W. N. 115; Mir Wajiruddin v. Deokinandan 6 C. L. J. 472; Jawad Ali v. Jnanada Sundari 3 C. L. J. 387.

106. Lutf Ali v. Futteh Bahadur 16 I. A. 129; 17 Cal. 23; Bhaja Chowdhary v. Chuni Lal 11 C. W. N. 281; 5 C. L. J. 95.

LECTURE I. —
Tenants upon their paying him their shares of the money necessarily expended in the purchase.¹⁰⁷

iii. Decree-holder.

In execution sales, the decreeholder, other than landlord in suits for arrears of rent against the tenants, "shall not without the express permission of the Court bid for or purchase the property."¹⁰⁸ But leave to bid puts an end to the disability and "puts him in the same position as any independent purchaser,"¹⁰⁹ and not in a fiduciary position towards the Court or the owner of the property.¹¹⁰

A purchase by a person under a legal incapacity to purchase is not *ipso facto* void but only voidable.¹¹¹ Such a purchase is an offence punishable under S. 185 I. P. C.

iv. Co-sharer.

In a compulsory sale, the co-sharer of the property has always a preferential right to buy and is allowed to purchase the property at a sum offered by a stranger.¹¹²

Duty of purchasers.

All compulsory sales are required to be made at public auction and after due notice in order that free competition may be produced and the property sold at its market value. They should therefore be free from undue influence, controlling or stifling competition. Anything which tends to prevent competition is likely to produce a sacrifice of the interest of the parties interested. All purchasers are bound to abstain from breaches of trust and intimidation or falsehood in keeping off bidders. Any agreement, the object and effect of which is to chill the sale and stifle competition, is fraudulent and void and no party to the agreement can derive a benefit from the sale, for the law does not tolerate any influence likely to prevent competition at compulsory sales. But it does not follow that because one person bids for the benefit of himself and others or because two

107. Gonesh Persad v. Brij Bihari 1 C. L. J. 565; Bhoobun Chunder v. Ram Soonder 3 Cal. 200; Janki Singh v. Debinandan 15 C. W. N. 776; Matungini v. Prosannamoyi 3 C. L. J. 93; Harak Chand v. Charu Chandra 15 C. W. N. 5; 13. C. L. J. 102.

108. O. 21 r. 72 C. P. C. Act V of 1908.

109. Mahabir Pershad v. Macnaghten 16 I. A. 107; 16 Cal. 682; Mahomed Meera Ravuthar v. Savvasi Vijaya 27 I. A. 17; 23. Mad 227; 1 C. W. N. 228; Dakshipri Mohan v. Basumatri Deb 4

C. W. N. 471; Satis Chandra v. Porter 36 Cal. 226; 9 C. L. J. 244; Gunga Persad v. Jawahir 19 Cal. 4.

110. Izzut-un-nessa v. Pertab Singh 36 I. A. 203; 31 All. 583; 13 C. W. N. 1143.

111. Chintamanray v. Vithabai 11 Bom. 588; Mathura v. Nathuni 11 Cal. 731; Thatu v. Kondu 32 Mad. 242; Rukhinee v. Brojo Nath 5 Cal. 308.

112. O. 21 r.r. 77 (3), 88 C. P. C. Act V of 1908; S. 6 Partition Act IV of 1893; S. 14 B. L. R. S. Act XI of 1859; S. 182 N. W. P. & O. L. R. Act III of 1901; S. 110 C. P. L. R. Act XVII of 1881.

or more persons join their capital for the purpose of making a purchase at such sales, there has been an unlawful and fraudulent combination. It is not every joint bidding or partnership among bidders that is corrupt and fraudulent. To render it unlawful and void there must be a fraudulent intent to depress and chill the sale.¹¹³ The purchasers are not precluded from combining from honest motives to purchase property and to dissuade bidders from purchasing or from adopting means of an innocent character to discourage them.¹¹⁴ But if the object be to obtain property at a sacrifice or by any device or artifice to depress or prevent full and free competition in bidding, the combination is fraudulent, on the other hand, if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent.¹¹⁵

In a voluntary sale, the price may be immediately "paid or promised or part paid and part promised."¹¹⁶ In a compulsory sale, no one can be the purchaser unless he is the highest bidder and where the property sold is moveable property, the price of each lot shall be paid at the time of sale; but where the property sold is immoveable property, the purchaser, other than the decree-holder in an execution sale, must immediately deposit a portion of the purchase-money, varying from 15 to 25 p. c. and on his default the property will be forthwith resold. In no event can the second highest bidder be treated as the purchaser and his bid accepted. The deposit is taken not only in part-payment of the purchase-money but also as a guarantee for the due performance of the contract. From the date of the contract, the purchaser at a private sale is, in equity, the owner of the property sold, though not absolutely, but subject to the condition that the contract be specially enforceable. The property contracted to be sold is, in equity, his property; he can sell, charge or devise it. But if before an execution-sale becomes absolute, the purchaser resells at a profit, the sub-purchaser is considered as the substituted purchaser and must pay the additional purchase-money into the Court for the benefit

Purchase-money.

113. Freeman on Executions §. 297.

Porter 36 Cal. 226; 9 C. L. J. 244;

114. Mahomed Meera Ravuthar v. Jyotipakash v. Jhownull 36 Cal. 134; Savvasi Vijaya 27 I. A. 17; 23 Mad. 227; 4 C. W. N. 228.

13 C. W. N. 87.

115. Ambika Prasad v. R. H. Whitwell 6 C. L. J. 111; Satish Chandra v.

116. S. 54 T. P. Act IV of 1882; S. 78 I. C. Act IX of 1872

LECTURE I. of the parties to the suit.¹¹⁷ If, however, the purchaser resells after the sale has become absolute, the original purchaser, being the owner, is entitled to any increase in the price.¹¹⁸

Bidder's liability to complete the sale.

A bid can be retracted at any time before the fall of the hammer or other customary method.¹¹⁹ But as soon as the purchaser makes the initial deposit on the day of sale, he enters into, so to speak, a statutory contract with the Court to comply with the terms of the sale. Time is of the essence of the contract in such a case, although in equity it is not so "if there is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right."¹²⁰ The bid of the purchaser brings him within the jurisdiction of the Court with respect to all matters connected with the sale. Although the Court acts as a vendor, the maxim that no one should be a judge in his own cause does not apply. The Court can compel him to comply with the terms of the sale. If the purchaser assigns his bid, the assignee by accepting the assignment becomes to the same extent subject to the jurisdiction of the Court.¹²¹ If the bidder, therefore, makes default in depositing the balance of the purchase-money on the day fixed, not only does he forfeit to the Government the deposit previously made, and in the case of a sale under the B. L. R. S. Act XI of 1859, render himself further liable for contempt under S. 57, but he is liable for any deficiency of price which may happen on a resale and also for an offence punishable under S. 185 I. P. Code. But where it is sought to charge the purchaser with the deficiency resulting from a resale, the purchaser may shew that the second sale was not made in conformity with the terms of the first sale or has been attended by some misconduct by means of which the biddings were depressed and the property prevented from selling at a price which it would otherwise have realized.¹²² Under the L. A. Act I of 1894, however, the Government is at liberty to withdraw from the acquisition of any

117. Hodder v. Ruffin (1830) Taml. 341; 31 R. R. 104.

118. Dewell v. Tuffnell (1853) 1 K. & J. 324.

119. Kenaram v. Kailas Chandra 18 C. L. J. 53.

120. Per Lord Cairns in Tilley v. Thomas (1867) L. R. 3 Ch. 61 at p. 67.

121. Freeman on Executions § 313a.

122. Freeman on Executions § 313f; see Gangadas v. Suraj 36 Bom. 329; Baijnath v. Moheep 16 Cal. 535.

land of which possession has not been taken, even though the Collector has made an award,¹²³ but the Collector must pay to the owner compensation for the damage suffered by him in consequence of the notice of any proceeding.¹²⁴

No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale. A revenue sale in Bengal may be annulled by the Local Government on the recommendation of the Board of Revenue, on the ground of hardship or injustice,¹²⁵ or by the Commissioner of Revenue, if the sale was not conducted according to the provisions of the Act.¹²⁶ A sale of immoveable property in execution of a decree may be set aside within 30 days from the date of sale on depositing in Court 5 p.c. of the purchase-money, together with the amount due to the decree-holder, by the judgment-debtor or "any person either owning such property, or holding an interest therein by virtue of a title acquired before such sale."¹²⁷ The decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may also apply for setting aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale.¹²⁸ But neither mere inadequacy of price, however gross (unless the inadequacy is so gross as to be proof of fraud or to shock the conscience) nor irregularity or fraud in publishing or conducting the sale will by itself vitiate the sale, unless it is proved that had it not been for the irregularity or fraud the property would have realized a substantially larger price than what it did at the sale, i.e., there must be evidence, direct or circumstantial, to prove that the injury was the necessary result of the irregularity or fraud complained of,¹²⁹ in other words, that a subsequent sale, unattended with the irregularity complained of, will realize a better price. The purchaser also may apply for setting aside the sale, if the judgment-debtor had no saleable interest whatever in the property sold,¹³⁰ or if there be a fraudulent concealment of material particulars, although the

Annulment
of sale.

123. Ezra v. Sec. of State 30 Cal. 36; 7 C. W. N. 249.

124. S. 48 L. A Act I of 1891.

125. S. 26 Act XI of 1859.

126. S. 2 Act VII (B. C.) of 1868.

127. O. 21, r. 89 C. P. C. Act V. of 1908.

128. O. 21, r. 90 C. P. C. Act V of 1908.

129. Giridhari v. Hurdeo 3 I. A. 230; 26 W. R. 44; Maenaghiten v. Mahabir 10

I. A. 25; 9 Cal. 656; Aruna Chellam v.

Aruna Chellam 12 Mad. 19; Tasadduk

Rasul v. Ahmad Husain 20 I. A. 176;

21. Cal. 66; Surnomoyi v. Dakhina Ranjan 24 Cal. 291.

130. O. 21, r. 91 C. P. C. Act V of 1908.

LECTURE I. purchaser has accepted the title after enquiry.¹³¹ The judgment-debtor or any person, whose interests are affected by the sale, may apply to have the sale set aside, when the property has been purchased by a person incompetent to buy, such as, the decree-holder by himself or through another person without the permission of the Court, or by an officer or other person having any duty to perform in connection with the sale.¹³² But the purchase by such persons is not *ipso facto* void.

Refund of purchase-money.

In all cases, where a compulsory sale is set aside, the purchaser is entitled to the refund of the purchase-money, with or without interest, as the Court may direct, against any person to whom it has been paid, even against a minor.¹³³

Confirmation of sale;—vesting of property.

In the case of a voluntary sale, the property vests in the purchaser immediately on the transfer by the vendor. But in the case of a compulsory sale, other than a Putni sale which becomes final and conclusive on the payment of the purchase-money without any formal order of confirmation,¹³⁴ the purchaser has only an incohate right and the property does not vest in him until sometime after the sale, the Court passes an order confirming the sale. In the meantime, the sale is liable to be set aside on the ground of irregularity or fraud in publishing or conducting the sale or on other grounds. But if no application is successfully made to set aside the sale, there is only one duty left to the Court, *riz.*, to pass an order confirming the sale.¹³⁵ The confirmation of sale is essential to the transfer of the title and although it does not cure infirmities in the order for sale, in the absence of evidence to the contrary, it undoubtedly creates a presumption of the regularity and fairness of the original proceedings and it cannot be successfully insisted that a sale was void because the record or other evidence fails to show the existence of some fact which ought to have preceded the sale.¹³⁶ The chief value of the order of confirmation to the purchaser is to protect him from the claim that some supposed condition, precedent to the sale, has not been complied with and hence the sale cannot be sustained. After confirmation, the purchaser at a compulsory sale is as much entitled to the benefits of

131. Upendra Nath v. Obhoy Kali 5 C. W. N. 593.

132. O. 21 r.r. 72, 73 C. P. C. Act V of 1908.

133. Vishnu Keshav v. Ram Chandra 11 Bom. 130; Jungee Lall v. Shau Lall 20 W. R. 120; Bejoy Chaud v. Amrita Lal 27 Cal. 308.

134. Ramsona v. Sonamala 13 C. L. J. 404; Bhuban Mohan v. Girish Narain 13 C. L. J. 339.

135. Birj Mohan v. Umanath 19 I. A. 154; 29 Cal. 8; Sharifan v. Habibuddin 15 C. W. N. 685; 13 C. L. J. 535.

136. Freeman on Void Judicial Sales § 44; Freeman on Executions §. 286.

his purchase as a purchaser in *pais* and the sale in the one case can be set aside only on such grounds as would be sufficient in the other. But questions involving wrongful acts or devices of the purchaser or others of which he had notice, actual or constructive, when not suggested to the Court, remain open notwithstanding the confirmation. The curative powers of orders of confirmation extend to voidable rather than to void sale. If the Court had no jurisdiction to order sale, it is equally without jurisdiction to confirm a sale under its void order.¹³⁷

When a compulsory sale has become absolute, the Court shall grant a certificate to the purchaser specifying the property sold. It need not be registered,¹³⁸ but it must be stamped.¹³⁹ The execution of a certificate is a mere ministerial act. In granting the certificate, the Court acts as the agent appointed by law rather than by the parties, and this authority does not depend upon their continuing to live. Hence, the death of the judgment-debtor, either before or after the sale, does not destroy or suspend the power of the Court to grant the certificate, nor impair its force when executed.¹⁴⁰ The right held by the purchaser may be assigned by him so as to vest in the assignee the right to receive the certificate of sale in his own name.¹⁴¹ The certificate is the "statutory evidence of the transfer" of the property from the owner to the purchaser.¹⁴² But it does not create any title and the purchaser can establish his title by evidence, independently of the sale-certificate.¹⁴³ Nor, is the issue of a certificate necessary for the completion of the sale which must be deemed to become final and conclusive as soon as the purchaser becomes entitled to obtain such certificate on payment of the entire amount of the purchase-money.¹⁴⁴ Uncertified purchaser has an equitable or incalate title to the property sold which, when perfected by the issue of a certificate, has superiority over that created by a subsequent

Certificate of
sale is evi-
dence of title

137. Freeman on Void Judicial Sales § 44.

138. Ss. 17, 59 Registration Act XVI of 1908; Sarat Chandra v. Jatindra Nath 35 Cal. 614.

139. Art. 18 Sch. I Stamp Act II of 1899.

140. Freeman on Executions § 328.

141. Freeman on Executions § 313.

142. Buhuns Kowur v. Bhuhooree Lall 14 Moo. 496 at p. 523; Srinivasa v.

Seshayyangar 3 Mad. 37; Velan v. Knuiarasami 11 Mad. 296; Narayan v. Shamrao 27 Bom. 379; Balyant v. Hira Chand 27 Bom. 334.

143. Braja Nath v. Joggeswar 9 C. L. J. 316; Tautradhari v. Sundar Lal 7 C. L. J. 381; Khobhari Singh v. Ram Prasad 7 C. L. J. 387; Narayan v. Shamrao 27 Bom. 379.

144. Ramsona v. Sonamala 13 C. L. J. 404; Bhuban Mohan v. Girish Narain 13 C. L. J. 339.

LECTURE I. transfer.¹⁴⁵ Though the property does not vest in the purchaser until the sale has become absolute, the property will be deemed to have vested in the purchaser from the time when it was sold ; in other words, the vesting of the property is made to relate back to the date of sale. Hence, the right to mesne profits accrues to the purchaser from the date of sale ;¹⁴⁶ he is liable for Government revenue which becomes due between the date of sale and its confirmation,¹⁴⁷ and also for rent.¹⁴⁸ Before the confirmation of sale, although the owner, whose property is sold, is not bound to use the same care in managing the property sold as a trustee, as he must use with regard to the property subject to his trust, yet he must take such care as a prudent owner would take of his own property to preserve it in the same condition in which it was on the date of sale.

Suit against certified purchaser barred.

The certified purchaser shall be conclusively deemed to be the real purchaser and no suit shall be maintained against him on the ground that the purchase was made on behalf of the plaintiff or some one through whom he claims.¹⁴⁹ The statutory title, created by the certificate, is all that the Court is concerned with. As between the person named in the certificate and a third person, there may be a trust by virtue of which the former holds the property sold as trustee for the latter, but the Court has nothing to do with the ulterior consequences of the sale as between the purchaser and a third party. Hence, in all questions affecting the validity of the sale, the certified purchaser is alone to be regarded by the Court as the person who has purchased the property.¹⁵⁰ The object of the stringent provision of this law is merely to discourage benami

145. Adhur Chunder v. Aghore Nath 2 C. W. N. 589 ; Bhawani Koer v. Mathura Prosad 7 C. L. J. 1 ; Sharifan v. Habibuddin 15 C. W. N. 685 ; 13 C. L. J. 535 ; Yeshwant v. Govind 10 Bom. 453 ; Naigar v. Bhaskar 10 Bom. 444 ; Chintamanarav v. Vithabhai 11 Bom. 588 ; Khusal v. Bhimavai 12 Bom. 589.

146. Prem Chand v. Purnima Debi 15 Cal. 516 ; Amir Kazim v. Darbari Mal 24 All. 475 ; Adhur Chunder v. Aghore Nath 2 C. W. N. 589 ; Shiam Lall v. Nathe Lall 33 All. 63.

147. S. 30 B. L. R. S. Act XI of 1850 ; Bhyrub Chander v. Soudamini

2 Cal. 141 F. B. ; Chatraput Singh v. Grindra Chander 6 Cal. 389 ; 7 C. L. R. 456 ; Shyam Kumari v. Rameswar Singh 31 I. A. 176 ; 32 Cal. 27 ; 8 C. W. N. 786 ; Bhawani Kumar v. Mathura Prosad 39 I. A. 228 ; 40 Cal. 89 ; 16 C. W. N. 985 ; 16 C. L. J. 606.

148. Satyendra Nath v. Nilkantha 21 Cal. 389 ; Bejoy Chand v. Soshi Bhusan 18 C. W. N. 136 ; Karunamoyee v. Surendra Nath 26 Cal. 176.

149. S. 66 C. P. C. Act V of 1908 ; S. 28 B. L. R. S. Act XI of 1859.

150. Baroda Kanta v. Chunder Kanta 29 Cal. 652 ; 6 C. W. N. 706.

purchases at Court-sales but not to render such purchases illegal ; for this provision "cannot be taken to affect the rights of members of a Joint Hindu family who by the operation of law and not by virtue of any private agreement or undertaking (such as exists between the benamdar and the beneficial owner) are entitled to treat, as part of their common property, an acquisition however made by a member of the family in his sole name, if made by the use of the family funds."¹⁵¹ Nor, does the provision bar a suit by one of the partners for a declaration that the property purchased is partnership property.¹⁵²

All irregularities in the conduct of the sale are cured by the certificate of sale granted to the purchaser. An order of confirmation should protect the purchaser and be preclusive of all questions save that of jurisdiction of the Court over the property. The general principle is that the title of the purchaser, not himself in fault, cannot be impaired at law nor in equity by shewing any mere error or irregularity in the proceedings which, if not corrected by a direct proceeding, cannot be made available by way of collateral attack on the purchaser's title.¹⁵³ If the sale is not wholly void but only voidable, it cannot be attacked collaterally. Errors and irregularities in the proceedings leading up to the order of sale can be made a ground of attack only by some direct proceedings, either before the same Court or in an Appellate Court. A purchaser at a sale in execution of a decree, not a party to the suit, has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and that there is a valid decree and an order for sale and his title is not affected by irregularities of procedure "because otherwise there will be less inducement to intending purchasers to buy at an execution-sale, and consequently less chance of property fetching proper value at such sales."¹⁵⁴ All that a purchaser is to look to is, that the order for sale was duly made and properly carried out and that all persons interested in the property sold were, or are, either parties to or otherwise bound by the proceedings in which the order for sale was made. "If he is bound to inquire into the accuracy of the Court's conduct of its own business

Certificate of
sale cures ir-
regularities.

151. Bodh Singh v. Gunesh Chunder

29 All. 557.

19 W. R. 356 ; 12 B. L. R. 317 P. C. ; see

153. Freeman on Executions § 339.

Toondun v. Pokh Narain 1 I. A. 342 ; 20

154. Mukhoda v. Gopal Chunder 26

W. R. 54.

Cal. 734 ; Shiv Lal v. Shambhu Prasad

152. Achhaibar Dube v. Tapasi Dube

29 Bom. 435.

LECTURE I. no purchaser at a Court-sale will be safe. Strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do."¹⁵⁵ The public policy demands that there should be such confidence in the proceedings of the Courts and of their officers that persons acting in good faith, shall not be afraid to invest their capital in the purchase of property exposed to the hazards of sacrifice at compulsory sales. But public policy never requires that any man shall be secured the fruits of his own fraud, or even the fruits of a fraud perpetrated by others and brought within his knowledge at the time he made his investment; on the contrary, a sound policy requires that every species of fraud shall be discouraged and punished. When by a fraudulent contrivance, the purchaser has obtained an unquestionable advantage, equity will beyond question compel him to relinquish it. Thus, a title acquired through the aid of false representation or of any trick, device, imposture or other fraud, is, while held by the guilty purchaser, utterly worthless and void. And in order to be purged of the vices by which it was infected by the misconduct of the original purchaser it is essential that the title should be transferred in good faith and upon a valuable consideration to some person who is both guiltless and ignorant of those vices; for a purchaser with notice has no higher equity and will receive no further protection than a participant in the fraud. If on the other hand, there were fraudulent devices or tricks resorted to, which the purchaser had no notice, they cannot operate to impair his title. Although the original purchaser has himself been guilty of fraudulent devices or has had notices of such devices practised by others, he can transmit a valid unimpeachable title to a vendee in good faith and without notice.¹⁵⁶

Reversal of a decree does not annul a sale,

Nor, will the reversal of the decree, subsequent to the confirmation of sale, affect its validity, if the purchaser is a person other than the decree-holder.¹⁵⁷ "If the court has jurisdiction, a purchaser is no more bound to enquire into the correctness of an

155. *Malkarjun v. Narhari* 27 I. A. 216; 25 Bom. 337; 5 C. W. N. 10.

156. *Freeman on Void Judicial Sales* §.41.

157. *Zainulabdin v. Asghar* 15 I. A. 12; 10 All. 166; *Set Umed v. Srinath*

27 Cal. 810; 4 C. W. N. 692; *Chandan v. Ramdeni* 31 Cal. 499; *Mokhoda v. Gopal Chunder* 26 Cal. 731; *Nathadu v. Nallu Mudaly* 27 Mad. 98; *Shivlal v. Shambln Prasad* 29 Bom. 435; *Paresh Nath v. Hari Charan* 38 Cal. 622; 15 C. W. N. 875; 14 C. L. J. 300.

order for execution than he is, as to the correctness of the judgment on which the execution issues."¹⁵⁸

But where the Court sold a transferable under-tenure without previously issuing a warrant against the person or moveable property of the judgment-debtor under s. 105 of the Rent Recovery Act X of 1859, the Court was acting without jurisdiction and a suit lies to set aside the sale, although the purchaser might have been a stranger.¹⁵⁹ Similarly, a sale held in contravention of ss. 109 and 110 of Act X of 1859 is *ultra vires*.¹⁶⁰ So also, where a revenue sale is null and void, s. 8 of Act VII (B. C.) of 1868 would not make it valid on the ground that the purchaser has obtained a certificate of sale which does not cure non-issue of notification under s. 5 Act XI of 1859,¹⁶¹ but only cures the defects in the procedure to be observed regarding the service and posting of the notices required to be served and posted under the Act.¹⁶²

After the sale has been confirmed, the reversal of the decree will set aside the sale, only if the decree-holder is the purchaser who "must be held to have notice of all the facts" and proceedings, relating to the suit and execution proceedings,¹⁶³ for a decree-holder should not be allowed to employ the machinery of the Court to secure for himself, perhaps, at a grossly inadequate price, the property of the judgment-debtor.¹⁶⁴ But where the decree-holder purchased and resold to a bonafide purchaser for value the purchaser gets a good title, though the decree may be subsequently reversed.¹⁶⁵

After the purchaser has obtained the certificate of sale, he is put in possession of the property and if any person obstructs, his

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except where it is fraudulent or without jurisdiction,

or where the decree-holder is the purchaser.

Delivery of possession.

158. Rewa Mahton v. Ram Ki-hen 13 I. A. 106; 11 Cal. 18; Bal Kishna v. Masuma 9 I. A. 182; 5 All. 142; 13 C. L. R. 232.

159. Damoodar Misra v. Iswar Chandra 15 C. W. N. 78.

160. Chaiton Patgost v. Kunja Behary 38 Cal. 832; 15 C. W. N. 863; 14 C. L. J. 284; Barkal Parida v. Jogendra Nath 16 C. W. N. 311; 14 C. L. J. 168; Bhikari Sakul v. Godadhar Ramanuj 17 C. W. N. 87; 16 C. L. J. 586.

161. Gonesh Perishad v. Brij Bihary 1 C. L. J. 535; Deonandun v. Wimbedh 32 Cal. 111; 8 C. W. N. 757.

162. Mobaruk v. Sec. of State 11 Cal. 200; Sheoratan v. Net Lal 30 Cal. 1; 6 C. W. N. 688.

163. Khairajmul v. Diam 32 I. A. 23; 32 Cal. 296; 9 C. W. N. 202; 1 C. L. J. 584; Set Umed v. Sruvath 27 Cal. 810; 4 C. W. N. 692; Zainulaldin v. Asghar 15 I. A. 12; 10 All. 166; Chandan v. Ramdeni 31 Cal. 499; Narsingh Narain v. Jai Mistry 15 C. L. J. 3.

164. Patringa Koer v. Madhavanand Ram 14 C. L. J. 476.

165. Sheik Ismal v. Rajab Rowther 30 Mad. 295.

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claim is summarily enquired into. The delivery of "symbolical or formal possession," as it is called, is equivalent to a complete transfer of actual possession as against the person who is a party to the suit or proceedings¹⁶⁶ and the Court "will protect the purchaser against the parties to the action and all parties coming in under the decree" but will not confer on a purchaser a good title as against all the world.¹⁶⁷

Mode of setting aside compulsory sales.

If the Legislature has provided any particular mode of getting the sales set aside, as a general rule, they cannot be set aside in any other way. "When statutory rights and liabilities have been created and jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Courts."¹⁶⁸ If, for any irregularity or any other cause it would be inequitable to permit the sale to stand, the proper remedy is by a summary application to the Court in which the sale was made for a resale of the property, upon such terms and conditions as may be just, so as to protect the rights of the purchaser, as well as the rights of the parties interested in the sale. It would seriously affect the interest of those whose property is sold under orders of the Court, if it was understood that questions of this kind were to be litigated and determined in a collateral suit. For no man of ordinary prudence would bid what he believed to be the fair cash value of the property at a Court sale, if he would be subjected to the expense and delay of a protracted suit to determine whether the proceedings had been strictly regular. But if the charge is, that the sale ought to be vacated for matters not apparent from an inspection of the proceedings, such as combination to depress bidding or any other species of fraud, or for any misconduct on the part of the officer conducting the sale, the purchaser's title cannot be divested otherwise than by an independent suit.¹⁶⁹ Thus, no sale under the B. L. R. S. Act XI of 1859 shall be annulled by a Court of Justice upon the ground of its having been made contrary to the provisions of the Act, unless such ground shall have been declared and specified

166. Mir Waziruddin v. Deokinandau 6 C. L. J. 472; Juggobundhu v. Ram Chunder 5 Cal. 584; 5 C. L. R. 548.

167. Jones v. Barnett (1899) 1 Ch. 611; (1900) 1 Ch. 370 C. A.

168. Bhandi Singh v. Ramadhan Roy

10 C. W. N. 991; 2 C. L. J. 359; Icharan Singh v. Nilmoney Balidar 35 Cal. 470; 12 C. W. N. 636; 7 C. L. J. 499; B. I. S. N. Co. v. See. of State 38 Cal. 230; 15 C. W. N. 87; 12 C. L. J. 505. 169. Freeman on Executions § 310.

in an appeal made to the Commissioner under S. 2 of Act VII (B. C.) of 1868. The reason is thus assigned by the Judicial Committee :—“ Sales for arrears of revenue are of constant occurrence ; anything which impairs the security of the purchasers at these sales, tends to lower the price of the estates put up for sale. It is, therefore, of the utmost importance in the interest of the revenue-paying population of India that all questions that can arise as to the validity of sale for arrears of revenue should be determined speedily and that when the sale has been confirmed by the Commissioner, the purchaser should not be exposed to the danger of having his sale set aside on new grounds.”¹⁷⁰ The rule is the same where the sale was irregularly conducted, as well as, where the sale was illegal, in consequence of an express provision having been contravened.¹⁷¹ Similarly, S. 244 C. P. C. of 1882 (S. 47 C. P. C. Act V of 1908) was held to bar a fresh suit in relation to the execution, discharge or satisfaction of a decree. The Judicial Committee observed :—“ It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244 and that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit is interested in the result, has never been held a bar to the application of the section.”¹⁷² But where a party has been unable to put forward his claim by reason of defects and irregularities in the proceedings, or where the claim has not been adjudged, the jurisdiction of the Civil Courts cannot be treated as ousted.¹⁷³

A suit to set aside a sale (*a*) in execution of a decree of a Civil Court or (*b*) in pursuance of a decree or order of a Collector or other revenue officer or (*c*) for arrears of Government revenue or any demand recoverable as such arrear or (*d*) of a putni taluk (including any intermediate tenure saleable for current arrears of

Suit to set aside compulsory sales.

170. Gobind Lal v. Ram Janam 21 I. A. 165 ; 21 Cal. 70.

171. Gobind Lal v. Ram Janam 21 I. A. 165 ; 21 Cal. 70 ; see also Bageswari v. Gowhar Ali 31 I. A. 52 ; 31 Cal. 256 ; 8 C. W. N. 649.

172. Prosunno Kumar v. Kalidas 19 I. A. 166 ; 19 Cal. 683.

173. Rameswar v. Sec. of State 31 Cal. 470 ; 11 C. W. N. 356 ; 5 C. L. J. 669.

LECTURE I.

rent) sold for arrears of rent, must be brought within one year from the date when the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought under Art 12 Sch. I Limitation Act IX of 1908. The object of providing for this short period of limitation is to protect the bonafide purchasers.¹⁷⁴ It applies to those cases only in which the sales would be binding on the plaintiff if not set aside.¹⁷⁵

Void compulsory sales.

Sales are void, either because the Court had no jurisdiction to order sale, or because proceedings subsequent to the order for sale are invalid, or because the order for sale has lost its original force by appeal, lapse of time, satisfaction or some other adequate cause. If the order or judgment on which a sale was made, was one resulting from a controversy which the Court had in no circumstance any power to determine, there was an absence of jurisdiction over the subject matter and the sale is incurably void.¹⁷⁶ So, if circumstances are established, which shew that the sale has been held without jurisdiction, it cannot rightly be regarded as one made under the provisions of the statute, and may consequently be challenged by a Civil Court without recourse to the procedure laid down in the statute. Void sales are sales which, as against the original purchaser, may without any proceeding to set them aside, be treated as not transferring the title of the property assumed to be sold. Thus, where there is no foundation for the exercise of jurisdiction by the Revenue authority, the person injuriously affected is not deprived of his remedy by recourse to the ordinary law¹⁷⁷ and an appeal to the Commissioner is not the only remedy.¹⁷⁸ When there is no arrear

174. *Malkarjun v. Narhari* 27 I. A. 216; 25 Bom. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 10 Mad. L. J. 368; *Venkatapathi v. Subramanya* 9 Mad. 457.

175. *Ram Lall v. Banna Sundari* 12 Cal. 307; *Balwant v. Muhammad Husain* 15 All. 324; *Mobaruk v. Sec. of State* 11 Cal. 200; *Dakhina v. Bilash* 18 Cal. 526; *Nazar v. Kedar* 19 All. 308; *Malkarjun v. Narhari* 27 I. A. 216; 25 Bom. 337; 5 C. W. N. 10; 10 Mad. L. J. 368; *Ragavendra v. Karappa* 20 Mad. 33; 6 Mad. L. J. 278; *Parekh v. Bai Vakhat*

11 Bom. 119.

176. *Freeman on Judgments* S. 120.

177. *Mohibul Huq v. Shew Sahay 25 Cal. 85; Nandan Misser v. Harakh Narain* 14 C. W. N. 607; 11 C. L. J. 266; *Janakdhari v. Gossain Lal* 37 Cal. 107; 13 C. W. N. 710; 11 C. L. J. 254; *Harkoo Singh v. Bunsidhur Singh* 25 Cal. 876; 2 C. W. N. 360.

178. *Ram Taruck v. Dilwar Ali* 29 Cal. 73; 5 C. W. N. 521; *Girish Chandra v. Golam Karim* 33 Cal. 451; 10 C. W. N. 347; 3 C. L. J. 235.

of revenue the Collector has no jurisdiction to sell.¹⁷⁹ So, where the land actually taken up under the L. A. Act I of 1894 is different from that covered by the declaration, the whole proceedings are void.¹⁸⁰

Similarly, where the sale cannot rightly be regarded as one made under the provisions of the P. D. R. Act III (B. C) of 1913, it may be challenged by civil suit without recourse to the procedure laid down in the Act, as where certificate was not duly made, nor, notice served ;¹⁸¹ or, where the sale was held in execution of a certificate which had been satisfied or of a satisfied judgment, the satisfaction of which had been certified to the Court.¹⁸² Similarly, a suit lies to set aside a sale in execution of an *ex parte* decree when both the decree and the sale are impeached on the ground of fraud,¹⁸³ or where a minor was not properly represented by a guardian *ad-litem*.¹⁸⁴ But where a person is not a party to a decree or sale by an order of Court and is in no way affected thereby, it is not necessary for him to have the sale set aside.¹⁸⁵

The general rule that a confirmation or ratification cannot strengthen a void estate, has no application to compulsory sales, which may be ratified either directly or by a course of conduct which estops the party from denying their validity. Thus, if the judgment-debtor, after a void sale of his properties has been made, claims and receives the surplus sale-proceeds with a full knowledge of his rights, or permits the proceeds to be applied to the payment of his debts, or

Ratification
of void sales.

179. Balkishen v. Simpson 25 I. A. 151 ; 25 Cal. 833 ; 2 C. W. N. 513 ; Jogendra Mohan v. Uma Nath 35 Cal. 636 ; 12 C. W. N. 646 ; 8 C. L. J. 41 ; Ganga Pershad v. Irshad Ali 15 C. L. J. 51 ; Byjnath v. Seetul Pershad 10 W. R. 66 ; Harkoo v. Bunsidhar 25 Cal. 876 ; 2 C. W. N. 360.

180. Gajendra Shau v. Sec. of State 8 C. L. J. 39.

181. Baij Nath v. Ramgat 5 C. L. J. 687 ; Baijnath v. Ramgat 23 I. A. 45 ; 23 Cal. 775 ; Saroda v. Kista Mohun 1 C. W. N. 516 ; Chunder Kumar v. Sec. of State 27 Cal. 698 ; 4 C. W. N. 586 ; Gopal Das v. Hardeo Das 5 C. W. N. 86 ; Ramrup v. Khussal Misser 6 C. W. N. 630 ; Janki Das v. Ram Golam 28 Cal. 813 ; 6 C. W. N. 331.

182. Abdul Hai v. Gajraj 20 I. A. 70 ; 20 Cal. 826 ; Nandan Misser v. Harakh Narain 14 C. W. N. 607 ; 11 C. L. J. 266 ; Janakdhari v. Gassain Lal 37 Cal. 107 ; 13 C. W. N. 710 ; 11 C. L. J. 254 ; Pat Dasi v. Sharup Chand 14 Cal. 376 ; Kripi Sindhu v. Banchhanidhi 19 C. L. J. 388.

183. Radha Raman v. Prannath 28 Cal. 475 ; 5 C. W. N. 757 ; Khagendra Nath v. Prannath 29 I. A. 99 ; 29 Cal. 395 ; 6 C. W. N. 473.

184. Rashid-un-nissa v. Ismail Khan 36 I. A. 168 ; 31 All. 572 ; 13 C. W. N. 1182 ; 11 Bom. L. R. 1225.

185. Annada Pershad v. Prasannamoyi 34 I. A. 138 , 34 Cal. 711 ; 11 C. W. N. 817 ; 6 C. L. J. 17.

LECTURE I.

actively participates in the sale, as by being one of the bidders and making no claim at the time of the sale that it was irregular or unauthorized, his act must be treated as an irrevocable confirmation.¹⁸⁶

The principle that one who permits his property to be sold as the property of another, and by his action or unreasonable inactivity causes one to change his position to his prejudice, may be estopped from subsequently challenging it, is equally applicable to compulsory and other sales. It is a familiar principle of the law that a party accepting and retaining the proceeds of a void sale is estopped from assailing it. Hence, if relief is sought against a void or voidable sale, the Court may nevertheless refuse to grant relief unless the person claiming relief, do equity on his part; and, therefore, if the proceeds of sale were received by him or applied to discharge some valid lien or claim against the property, he may be required as a condition precedent to the setting aside of the sale or the granting of the other relief sought, to reimburse the purchaser not only for the amount of his bid, but also for the reasonable value of improvements made by him upon the property, when they are such as a prudent purchaser thereof would make in the use and management of the property.¹⁸⁷

Purchaser gets a statutory title.

i. Compulsory acquisition-

In a private sale, the purchaser derives title through the vendor by a contract with him and cannot acquire a better title than that of the vendor. But in a compulsory sale the purchaser does not derive his title by any contract with the owner but gets a statutory title. Thus, where land is compulsorily acquired under statutory powers, the acquirer cannot claim the benefit of the right of an ordinary purchaser of the surface of subjacent and adjacent support, for there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support and enjoyment of the things granted.¹⁸⁸ The owner of the mines has the right to work them up to and under the acquired land. He must, however, first give notice to the owners of the acquired land and unless they give him compensation for the subjacent minerals, that is, unless they buy out his right to work

186. Freeman on Void Judicial Sales § 50.

187. Freeman on Void Judicial Sales § 50; Freeman on Executions § 310.

188. G. W. Rail. Co. v. Benett (1867) L. R. 2 H. L. 27; M. Rail. Co. v. Robinson (1889) 15 App. Cas. 19; Eden v.

N. W. Rail. Co. (1907) A. C. 400; New Moss Colliery Ltd. v. Lord Mayor &c., Manchester (1908) A. C. 117 on appeal from Manchester Corporation v. New Moss Colliery (1906) 1 Ch. 278; Howley Park Coal and Canal Co. v. L. & N. W. Rail. Co. (1913) A. C. 11.

those minerals, he may exercise that right according to the usual manner of working such mines in the district, although such working may let down the surface.¹⁸⁹ The object of the statute is evidently to get rid of all ordinary law on the subject and create a new Code as to the relation between the parties. Again, the land vests absolutely in the Government, free from all incumbrances. Incohate and accruing rights, as well as easements already acquired, are extinguished by the acquisition of the land.¹⁹⁰

So, a purchaser of an entire estate at a sale for arrears of revenue takes the property free from all incumbrances, subject to certain exceptions and acquires it just as it was at the time of settlement,¹⁹¹ as well as, all lands which have subsequently accreted thereto by alluvion.¹⁹² He is not privy in estate to the defaulting proprietor. Nor, does he derive title from him, nor is he bound by his acts and laches.¹⁹³ There is no real distinction between a case in which the defaulting proprietor actively created an interest in favor of a stranger and the case in which he acquiesced in the creation of an interest in a stranger by operation of law.¹⁹⁴ "The statutory title which the law gives to an auction purchaser is that for the protection of revenue, and in order to ensure its due payment by him and to avoid the necessity of repeated sales of the property, he is remitted to all those rights which the original seller had at the date of the perpetual settlement and may, in consequence of that, sweep away or get rid of all intermediate tenures and incumbrances, created by the preceding Zamindar since that date."¹⁹⁵

ii. Revenue
sale.

189. Ss. 4, 7 L. A. (Mines) Act XVII of 1885; M. Rail. Co. v. Robinson (1889) 15 App. Cas. 19; Pountney v. Clayton (1883) 11 Q. B. D. 820; Rubon Brick and Terra Cotta Co. v. G. W. Rail. Co. (1893) 1 Ch. 427 C. A.; G. W. Rail. Co. v. Carpalla United China Clay Co. (1910) A. C. 83; N. B. Rail. Co. v. Budhill Coal and Sandstone Co. (1910) A. C. 116.

190. S. 16 L. A. Act I of 1894; Barlow v. Ross (1890) L. R. 24 Q. B. D. 381; Coll. of 24-Pergunahs v. Nobin 3 W. R. 27.

191. Goluckmonooe v. Huro Chunder 8 W. R. 62; Gokul Chandra v. Hara

Sundari 9 C. W. N. 383.

192. Kanta Proshad v. Sec. of State 8 C. W. N. 676.

193. Buzlool Rahman v. Prandhun 8 W. R. 222; Radha Gobind v. Rakhal Das 12 Cal 82; Maizuddi v. Ishan Chandra 15 C. W. N. 706; 13 C. L. J. 293; Gocool Bagdi v. Debendra Nath 14 C. L. J. 136.

194. Gocool Bagdi v. Debendra Nath 14 C. L. J. 136.

195. Per Sir J. Colville, in Forbes v. Mahomed Hossain 20 W. R. 44; 12 R. L. R. P. C. 210.

LECTURE I.

iii. Putui
sale.

At a sale for arrears of rent, whether of a putni taluk or a tenure or a holding, the purchaser acquires the property sold as it stood at its creation by the landlord, free of all incumbrances that may have accrued upon it by the act of the defaulter, his representatives or assigns, subject only to certain exceptions.¹⁹⁶

iv. Execu-
tion sale.

In a voluntary sale, the goods contracted to be sold need not be in existence, nor in the possession of the seller. Thus, a contract is valid for the sale of goods not in existence, but to be produced in pursuance of the contract, nor in the possession of the seller, and having no other reasonable expectation of acquiring them than by purchase,¹⁹⁷ for, "equity treating as done that which ought to be done fastens upon that property and the contract to assign becomes a complete assignment."¹⁹⁸ But the well-known doctrine, that where a person sells property of which he is not the owner but afterwards becomes the owner, he is bound to make good the sale out of his subsequently acquired interest, has no application where the sale is made at the instance of an execution creditor.¹⁹⁹ Thus, where immoveable property is sold in execution of a money-decree, "the purchaser notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law, adversely to the judgment-debtor and free from all alienations or incumbrances effected by him, subsequent to the attachment of the property sold in execution."²⁰⁰ If the existing incumbrances turn out to be invalid, the judgment-debtor, that is the vendor, has nothing to complain of. "After the purchase is completed the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase."²⁰¹ Similarly, at a certificate-sale the judgment-debtor's right, title and interest in the property at the date of service of notice of the certificate, passes to the purchaser.²⁰² If on the date of the service of notice,

196. Gopendro Chunder v. Mokaddam Hossain 21 Cal. 702.

197. Ss. 87, 88 I. C. Act IX of 1872.

198. Per Jessel M. R. in (1881) Collyer v. Isaacs 19 Ch. D. 342, cited in Palaniappa v. Lakshmanan 16 Mad. 429; Bansidhar v. Sant Lal 10 All. 133.

199. Alukmonee v. Banee 4 Cal. 677; 3 C. L. R. 473.

200. Dinendro Nath v. Ram Kumar

8 I. A. 65; 7 Cal. 107; 10 C. L. R. 281.

201. Per Lord Maenaghten, in Izzat-un-nissa v. Partap Singh 36 I. A. 203; 31 All. 583; 13 C. W. N. 1143; Shub Kunwar v. Sheo Prasad 28 All. 418; Ganesh v. Purshottam 33 Bom. 311.

202. Laehmi Narain v. Nand Kishore 29 Cal. 537; 6 C. W. N. 481; Raja Koer v. Gunga Singh 12 C. W. N. 750; 10 C. L. J. 201.

the judgment-debtor has no subsisting interest in the particular parcel of land, the purchaser, at the certificate-sale which follows, can acquire no valid interest therein.²⁰³ The purchaser purchases the interest of the judgment-debtor at the time of sale subject to all equities then existing,²⁰⁴ that is, what was attached and sold and what the purchaser without having special means of knowledge inferred from the proceedings of sale that he was buying, and not what might have been sold.²⁰⁵

In a private sale, there is, under S. 55 (2) of T. P. Act IV of 1882, in the absence of a contract to the contrary, an implied covenant of title by the vendor, but in a sale under a decree of Court no title is guaranteed to the purchaser, either by the decree-holder or by the Court, and the rule of *careat emptor* applies.²⁰⁶ There is only this implied warranty by the *decree-holder* that the judgment-debtor has *some* interest in the property put up for sale; but there is no warranty that the property will answer to the *description* given of it, as in a private sale, except that the purchaser shall have the judgment-debtor's right and interests in the property sold; for in an application for attachment, a specification of the judgment-debtor's share or interest is given "to the best of the belief of the applicant" and in the proclamation of sale, the property to be sold is specified "as fairly and accurately as possible."²⁰⁷

The doctrine of *lis pendens* applies to compulsory sales. The *Lis pendens*, execution-purchaser is as much bound by the doctrine of *lis pendens*, as a purchaser at a private sale.²⁰⁸ A purchaser at a sale for arrears of income-tax of the interests of a defaulter's representatives²⁰⁹ or at a sale under Ss. 13 and 54 of the B. L. R. S. Act XI of 1859, held at a time when execution proceedings in a suit to enforce a mortgage on the property were pending,²¹⁰ is affected by the rule.

203. Nanda Kumar v. Ajodhya Sahu 14 C. L. J. 292.

204. Mahomed Mozuffer v. Kishori Mohun 22 I. A. 129; 22 Cal. 909.

205. Alukmonee v. Banee 4 Cal. 677; 3 C. L. R. 473; Dorab Ally v. Abdool Azeez 5 I. A. 116; 4 Cal. 229; Tara Lal v. Sarobar Singh 27 I. A. 33; 27 Cal. 407; 4 C. W. N. 533.

206. Debi Singh v. Jia Ram 25 All. 214 F. B.; Sundara v. Venkata 17 Mad. 228.

207. O. 21 r.r. 13, 66 C. P. C. Act V of 1908.

208. Radhamadhub v. Manohar 15 I.

A. 97; 15 Cal. 756; Motilal v. Karabuldin 24 I. A. 170; 25 Cal. 179; 1 C. W. N. 639; Byramji v. Chunilal 27 Bom. 266; Faiyaz Husain v. Prag Narain 34 I. A. 102; 29 All. 339; 11 C. W. N. 561; 5 C. L. J. 563; Ramdayal v. Ramantoo 15 C. L. J. 137; Mahadeo Saran v. Thakur Prosad 11 C. L. J. 528; Motilal v. Preonath 9 C. L. J. 96.

209. Inderjeet v. Pootee 19 W. R. 197.

210. Harshankar v. Shew Gobind 26 Cal. 966; 4 C. W. N. 317; Bhowani Koer v. Mathura Pershad 7 C. L. J. 1.

Warranty
of title.

LECTURE I.

Represen-
tation.

When the sale is in execution of a decree against a person who, for the time being, represented the estate for which the debt was incurred,²¹¹ or against the manager or karta of a joint Mitakshara family,²¹² or against the recorded tenant who represented the holding on behalf of all his co-sharers,²¹³ or against a Hindu widow in respect of the family estate, or upon a cause not merely personal against her, such as, at a sale for arrears of revenue or of rent,²¹⁴ the whole property would pass and not merely the interests of the judgment-debtor. The test to be applied in such cases, to determine the exact interest which passes at the sale, is whether the suit in which the sale was directed was one, brought against the qualified proprietor upon a cause of action personal to him or which affects the whole property.²¹⁵ All that the persons not parties to the suit can claim, is that not being parties they ought not to be barred from trying the fact or the nature of the debt in a suit of their own.²¹⁶

Application of
sale-proceeds.

The purchaser at a compulsory sale is under no obligation to look to the proper application of the purchase-money, for the proceeds of sale are under the control of the Court and are applied, after deducting the expenses incident to the sale, according to the statutory directions and the title of the purchaser cannot be impeached, however unwise or illegal may be the disposition of the money by the Court. If the money is by mistake paid over to any person not entitled to receive the same, the Court has an inherent power to order a refund of it.²¹⁷

211. General Manager v. Ramput 14 Moo. 605; 17 W. R. 459, 10 B. L. R. 294.

212. Sakharam v. Devji 23 Bom. 372; Deendyal v. Jugdeep 4 I. A. 247; 3 Cal. 198; 1 C. L. R. 49; Doolarchand v. Lalla Chabeel 6 I. A. 47; 3 C. L. R. 561; Meenakshi v. Immudi 16 I. A. 1; 12 Mad. 142; Bhaghbut Pershad v. Gриja Koer 15 I. A. 99; 15 Cal. 717; Mahabir v. Markunda 17 I. A. 11; 17 Cal. 584.

213. Jagtara v. Dowlati 37 Cal. 75; 13 C. W. N. 1110; Gagan Sheikh v. Abejan Khatun 14 C. L. J. 180.

214. Debi Dass v. Biprocharan 22 Cal. 641; Banalata v. Monmota 11 C. W. N. 821; Jibin Krishna v. Brojolal 30 I. A. 81; 30 Cal. 550; 7 C. W. N. 425

on appeal from 26 Cal. 285; Jugol Kishore v. Jotindro Mohun 11 I. A. 66; 10 Cal. 985.

215. Radha Kissen v. Nauratan 6 C. L. J. 490; Trilochan v. Bakkeswar 15 C. L. J. 423.

216. Simbhunath v. Golap Singh 15 I. A. 77; 14 Cal. 572; Pettachi Chettiar v. Sanglivira 14 I. A. 81; 10 Mad. 241; Abdul Aziz v. Appayasami 31 I. A. 1; 27 Mad. 131; 8 C. W. N. 186.

217. Jogesh Chandra v. Yakub Ali 17 C. W. N. 1057; Mrinalini v. Abinash 14 C. W. N. 1024; 11 C. L. J. 533; Coll. of Ahmedabad v. Lavji Mulji 35 Bom. 255; 10 Ind. Cas. 818; 13 Bom. L. R. 259; Harish Chandra v. Chandra Mohan 28 Cal. 112; Gobindranee v. Brindarane 35 Cal. 1104; 12 C. W. N. 1039.

LECTURE II.

Compulsory Sales for public purposes.

(Mode of acquisition.)

The authority of the Crown to appropriate lands of private individuals being unquestioned, it is only controlled by two considerations, *viz.*, (1) that it is acquired for public purposes and (2) that compensation is paid for the injury occasioned by what is thus legalised by legislature. Accordingly, the legislature, in its anxiety to check the arbitrary exercise of this power and to safeguard the private interests, has laid down rules so that no injustice is done to private individuals by confiscation of their lands.

The legislation in India, however, in regard to compulsory purchase and compensation, has shown a continual growth alike to meet the requirements of new undertakings and to protect more efficiently the rights of property of private individuals.

Reg. I of 1824, Ss. 1-7, was the first enactment regarding the acquisition of land in India. In 1850, its provisions were extended to Calcutta by Act I and to railways by Act XLII. As regards Bombay, there were Act XXVIII of 1839 and Act XVII of 1850. In the Madras Presidency, there were Act XLII of 1850, Act XX of 1852 and Act I of 1854. Subsequently, Act VI of 1857 repealed all these enactments and applied itself to all the East India Company's territories and Act XXII of 1863 applied to all the acquisitions of land by private persons and companies. Act X of 1870 repealed and consolidated all former acts which in its turn was repealed by Act I of 1894.

Uniformity in the law of compensation is of great importance. The L. A. Act I of 1894 was passed in order to comprise in one general Act sundry provisions relating to the acquisition of lands for public purposes and the compensation to be paid for the same. This, of course, deals with surface lands, leaving the acquisition of mines and minerals situate under the lands to be acquired, to be regulated by L. A. (Mines) Act XVIII of 1885. The provisions of L. A. Act I of 1894 apply to all acquisitions of public nature so far as they are applicable, unless they are varied by special Act. The rule is that L. A. Act I of 1894 is to be followed, unless the special Act by express words or necessary implication varies or excepts it. The

Statutes relating to the acquisition of land for public purposes.

LECTURE II.

L. A. Act I of 1894 and the special Act when incorporated are construed together as forming one Act.¹

Interpretation
of statutes
relating to
acquisition.

The L. A. Act I of 1894 aims at promoting important public interests of such paramount character that in interpreting the intention of the legislature, a construction necessary to effectuate that intention must be given to it.² So the principle of construing special Acts, dealing with private companies where the language is ambiguous, against the company and in favor of private property, is not to be extended to the case of acquisition of land for public purposes.

1. The Acts that refer directly to the acquisition of land are :—
 - i. The Bengal Embankment Act VI (B. C.) of 1873, S. 29.
 - ii. The Northern India Canal and Drainage Act VIII of 1873, S. 28.
 - iii. The Indian Forest Act VII of 1878, Ss. 10, 83.
 - iv. The Bengal Irrigation Act III (B. C.) of 1876, S. 52.
 - v. The Bombay Port Trust Act VI of 1879, Ss. 27, 32.
 - vi. The Rangoon Port Commissioners' Act XV of 1879, S. 13.
 - vii. The Bengal Drainage Act VI (B. C.) of 1880, Ss. 21-23.
 - viii. Burma Forest Act XIX of 1881, S. 12.
 - ix. The Bengal Embankment Act II (B. C.) of 1882, Ss. 36-41.
 - x. The Indian Easements Act V of 1882, S. 13, ill (d).
 - xi. The Punjab District Board's Act XX of 1883, S. 61.
 - xii. Madras District Municipalities Act IV (M. C.) of 1884, S. 279.
 - xiii. Madras Municipal Act I of 1884, S. 443.
 - xiv. Bengal Municipal Act III (B. C.) of 1884, Ss. 35-36.
 - xv. Indian Telegraph Act XIII of 1885.
 - xvi. Bengal Tenancy Act VIII of 1885, S. 84.
 - xvii. The Land Acquisition (Mines)

- Act XVIII of 1885.
 - xviii. The Indian Tramways Act II of 1886, S. 7 (3).
 - xix. Bombay City Municipal Act III (B. C.) of 1888, S. 91.
 - xx. The Indian Railways Act IX of 1890, Ss. 7 (1), 10 (2).
 - xxi. The Punjab Municipal Act XX of 1891, S. 40.
 - xxii. The Bengal Sanitary Drainage Act VIII (B. C.) of 1895, S. 16.
 - xxiii. City of Bombay Improvement Act IV of 1898, S. 47.
 - xxiv. Calcutta Municipal Act III (B. C.) of 1899, Ss. 556, 557.
 - xxv. Bombay District Municipal Act III of 1901, S. 41.
 - xxvi. The Indian Works of Defence Act VII of 1903.
 - xxvii. The Central Provinces Municipal Act XVI of 1903, S. 53.
 - xxviii. The Ancient Monuments Preservation Act VII of 1904, Ss. 10, 21.
 - xxix. The Calcutta Improvement Act V (B. C.) of 1911, Ss. 69-81.
- N.B.—The Indian Works of Defence Act VII of 1903 imposes restrictions upon the use and enjoyment of land in the vicinity of works of defence and uses its own machinery for attaining its objects.
2. *Balvant Ramchandra v. Sec. of State* 29 Bom. 480 at p. 505; 7 Bom. L. R. 497.

or for a public body, which involves the promotion of important public interests to which private interests ought to be subordinated.³

The subject matter of acquisition and compensation is "land," which includes "benefits to arise out of lands and to anything attached to the earth."⁴ It does not mean merely firm land but also land covered with water and the benefits derived from such water. It is the land with all the interests in it taken as a whole and not merely fragmentary or subsidiary rights, e.g., easements or fishery rights detached from the soil.⁵ Buildings, trees and standing crops are things attached to the earth and are thus included in the definition of land.⁶ "Land" in S. 557(l) Calcutta Municipal Act III (B.C.) of 1899 includes *bustee lands*, i.e., lands let out for the building of huts, under an arrangement by which each tenant of the land is the owner of his hut.⁷

A part only of a house, manufactory or other building cannot be acquired if the owners desire that the whole shall be acquired.⁸ Any structure adapted for one occupation is a house ; but it need not be adapted, exclusively or primarily, for purposes of residence.⁹ House includes land, curtilage, garden and all that is necessary to its enjoyment.¹⁰ Where a portion of a holding used for residential purposes

LECTURE II.

Subject matter of acquisition :—land,

3. Maxwell's Interpretation of Statutes 5th Ed. pp. 487-8 ; see also Herron v. Rathmines Commissioners (1892) A. C. 498 ; N. L. Rail. Co. v. Metropolitan Board of Works (1859) 28 L. J. Ch. 909 ; Galloway v. Mayor and Commonalty of London (1866) L. R. 1 H. L. 34 ; 35 L. J. Ch. 477 ; cf. Parker v. G. W. Rail. Co. (1811) 13 L. J. C. P. 105 ; Simpson v. S. S. Water Works Co. (1865) 31 L. J. Ch. 380 ; Clowes v. Staffordshire Potteries Water Works Co. (1872) Ch. App. 125 ; 42 L. J. Ch. 107.

4. S. 3(a) L. A. Act I of 1891. See also S. 3(25) General Clauses Act X of 1897.

5. Bombay Improvement Trust v. Jalbhoy 33 Bom. 183 ; 11 Bom. L. R. 674 ; G. W. Rail. Co. v. Swindon &c. Rail. Co. (1881) 9 App. Cas. 787 ; Sec. of State v. Belchambers 33 Cal. 396 ; 10 C. W. N. 289 ; 3 C. L. J. 165 ; Shyam Chunder v. Sec. of State 35 Cal. 525 ; 12 C. W. N.

569 ; 7 C. L. J. 445 ; Babu Jan v. Sec. of State 4 C. L. J. 256 ; Govt. of Bombay v. Esufali 34 Bom. 618 ; 5 Ind. Cas. 621 ; 12 Bom. L. R. 34.

6. Sub-Coll. of Godavari v. Seragam Subrareydu 30 Mad. 151 ; 16 Mad. L. J. 551 ; Sec. of State v. Duona Lal 13 C. W. N. 187 ; Cheda Lal v. Mulchand 11 All. 30 ; Dakhyan v. Dolegobind 21 Cal. 430 ; Surat Lal v. Umar Haji 22 Cal. 877 ; Joseph v. Salt Co. 17 Mad. 371.

7. Sec. of State v. Belchambers 33 Cal. 396 ; 10 C. W. N. 289 ; 3 C. L. J. 169.

8. S. 49 L. A. Act I of 1891 ; Denman & Co. v. Westminster Corporation (1906) 1 Ch. 164.

9. Richards v. Swansea Improvement and Tramways Co. (1878) 9 Ch. D. 425 ; Regents Canal and Dock Co. v. London County Council (1912) 1 Ch. 583.

10. Barnes v. S. S. Rail. Co. (1881) 27 Ch. D. 536.

LECTURE II. is acquired and the remaining portion is rendered useless for such purposes, it is immaterial whether the whole holding is a "house," as compensation for the entire holding must be paid owing to damage caused by severance.¹¹

manufactory, Manufactory includes the whole of any building part of which is used as a factory, or where manufacturing process is carried on.¹² But land used for auxiliary manufacturing processes is not a "manufactory."¹³ Anything that is reasonably required for the full and unimpaired use of a house, manufactory or building is to be considered as part of it.¹⁴ But, whether the land is or is not so reasonably required, is a question of fact depending upon the particular circumstances of each case.¹⁵ The fact that the part left will require reconstruction is not conclusive evidence that it will not be a house.¹⁶ Nor, the fact that the part left would be a substantial building which, with some alteration and re-arrangement, would be capable of being efficiently used as a factory is not enough, for the owner cannot be compelled to make such alterations.¹⁷ Where any portion of a block of buildings is structurally connected with the main block, the onus is on the person acquiring the land to shew that it is not reasonably required for the full and unimpaired use of the house.¹⁸

Mines and minerals.

"Land" includes mines and minerals.¹⁹ Whether a particular substance is or is not a "mineral" is a question of fact to be determined by evidence.²⁰ Clay forming the surface or subsoil is not a

11. Sarat Chandra v. Sec. of State 10 C. W. N. 250.

12. Brook v. M. S. and L. Rail. Co. (1895) 2 Ch. 571; Sparrow v. Oxford etc. Rail. Co. (1852) 21 L. J. Ch. 731; Spackman v. G. W. Rail. Co. (1855) 27 L. J. (O. S.) 22.

13. Reddin v. Metropolitan Board of Works (1862) 31 L. J. Ch. 660; Sulter v. M. D. Rail. Co. (1870) L. R. 9 Eq. 132.

14. S. 19 L. A. Act I of 1891; S. 11 Sch. C. I. Act V (B. C.) of 1911; Nita Ram v. Sec. of State 30 All. 176 Venkataratnam v. Coll. of Godavari 27 Mad. 359; Furniss v. M. Rail. Co. (1868) L. R. 6 Eq. 173.

15. Nita Ram v. Sec. of State 30 All.

176; Pulling v. L. C. and D. Rail. Co. (1861) 33 L. J. Ch. 505.

16. J. L. Denman & Co. v. Westminster Corporation (1906) 1 Ch. 464.

17. Green v. Corporation of Hackney (1910) 2 Ch. 791; Davies v. Corporation of the City of London (1913) 1 Ch. 415; Gibbon v. Paddington Vestry (1900) 2 Ch. 791.

18. Venkataratnam v. Coll. of Godavari 27 Mad. 359.

19. Smith v. G. W. Rail. Co. (1877) 3 App. Cas. 165; Holliday v. Mayor of Wakefield (1891) A. C. 81; in re Lord Granard etc. (1905) 1 K. B. 159.

20. Hugh Symington v. G. Rail. Co. (1912) A. C. 87.

mineral.²¹ But China clay is a mineral.²² Gravel is,²³ but sandstone is not, a mineral.²⁴ By S. 69 Bombay Land Revenue Code Act V (Bo.C.) of 1879, S. 29, Punjab Land Revenue Act XXXIII of 1871, S. 3 Ajmere Land and Revenue Reg. II of 1877, S. 151 Central Provinces Land Revenue Act XVIII of 1881, the Government reserves to itself the right to all mines and mineral products. In Bengal, however, where the Permanent Settlement was made, all rights to mines and minerals became vested in the Zemindars. Where a permanent heritable and transferable tenure is granted by a Zemindar without any reservation, the Zemindar must be presumed to be the owner of the underground rights thereto appertaining, in the absence of evidence that he parts with them.²⁵

Lands may be acquired either for public purposes or for a company registered under the Indian Companies Act VI of 1882, or under the English Companies Acts 1862-1890, or incorporated by an Act of Parliament, or of the Governor-General in Council, or by Royal Charter or Letters Patent.²⁶ In making the acquisition the wishes of the owners of the land are wholly irrelevant. All his objections are limited to the amount of compensation and matters connected therewith, such as area and measurement. The Act vests the Local Government with absolute discretion in the matter of acquisition, irrespective of any consideration of the willingness or unwillingness of the owner to part with his land.²⁷ Acquisition of land for a company can be made only through the Collector, but no action can be taken by him without the previous consent of the Local Government.²⁸ But before such consent is given, there must be an enquiry by an officer appointed by the Local Government into the questions, (*a*) whether such acquisition is needed for the construction of some work and whether (*b*) such work is likely to prove

Purposes of
acquisition.

21. Long Eaton &c. Co. v. M. Rail. Co. (1902) 2 K. B. 574; G. W. Rail. Co. v. Blades (1901) 2 Ch. 624.

22. G. W. Rail. Co. v. Carpalla United China Clay Co. (1910) A. C. 83.

23. Scott v. M. Rail. Co. (1901) 1 K. B. 317.

24. N. W. Rail. Co. v. Budhill Coal and Sandstone Co. (1910) A. C. 116.

25. Durga Prasad v. Braja Nath 39 I. A. 133; 39 Cal. 698; 16 C. W. N. 182; 15 C. L. J. 161; Jyoti Proshad v.

Lachipur Coal Co. 38 Cal. 845; 16 C. W. N. 211; 14 C. L. J. 361; Ali Quader v. Jogendra Narain 16 C. L. J. 7; Hari Narayan v. Sriram 37 I. A. 136; 37 Cal. 723; 14 C. W. N. 746; 11 C. L. J. 653 reversing Sriram v. Hari Narain 33 Cal. 51; 10 C. W. N. 125; 3 C. L. J. 59.

26. S. 3 (r) L. A. Act I of 1891.

27. Ezra v. Sec. of State 30 Cal. 36; 7 C. W. N. 249.

28. S. 39 L. A. Act I of 1891.

LECTURE II. useful to the public.²⁹ The only persons concerned in this enquiry are the Government on one side which has to be satisfied and the company on the other which has to furnish materials for the purpose of satisfying the Local Government. No other person, not even the person whose land is intended to be taken, should be summoned or required to attend at the enquiry, or be allowed to make any objection to the acquisition.³⁰ When the Local Government is satisfied upon the report of the enquiry submitted by its own officer that the land is required for the construction of some work useful to the public, it shall require the company to enter into an agreement with the Secretary of State for India in Council providing for, among other things, the payment to the Government the cost of acquisition, the terms on which the lands should be held by the company and the terms on which the public shall be entitled to use the work.³¹ The Government is the sole judge of the manner in which the public are to have the use of the land taken up.³² If the company act *bona fide* they are the sole judges to determine in what way and on what lands any particular works shall be constructed : and it is immaterial that the works might be carried on in another way which might cause less inconvenience.³³ The onus of proving the want of *bona fides* rests upon the party opposing the acquisition of land.³⁴ Under S. 11 I. R. Act IX of 1890, the opinion of the executive with reference to the sufficiency of the accommodation work is final.³⁵

Acquisition
by landlord.

Under S. 84 B. T. Act VIII of 1885, the Civil Court may authorise the landlord to acquire the tenant's holding or part thereof for some reasonable and sufficient purpose, having relation to the good of the holding or of the estate in which it is comprised, including the use of the ground as building ground or for any religious or educational or charitable purpose, on a certificate of the Collector, that the purpose is reasonable and sufficient. But a person who is not the immediate landlord of the holding cannot make such acquisition.

29. S. 10 L. A. Act I of 1894.

30. Ezra v. Sec. of State 30 Cal. 36 ;
7 C.W.N. 249.

31. S. 41 L. A. Act I of 1894.

32. Ezra v. Sec. of State 30 Cal. 36 ;
7 C.W.N. 249.

33. S & D Rail. Co. v. Brown (1860) 9
H. L. Cas. 246 ; L. B. & S C. Rail. Co. v.

Truman (1885) 11 App. Cas. 45 ; Kemp

v. S. E. Rail. Co. (1872) 7 Ch. App. 364 ;
41 L. J. Ch. 404 ; Lamb v. N. L. Rail.
Co. (1869) 4 Ch. App. 522.

34. Errington v. M. D. Rail. Co.
(1883) 19 Ch. D. 559 ; 51 L. J. Ch. 305.

35. Seetamraju v. Coll. of Godavari
25 Mad. 632.

tion.³⁶ Nor, is the Collector's certificate conclusive, but the Civil Court is to hold the judicial enquiry to determine the reasonableness and sufficiency of the purpose.³⁷ The purpose must have a direct relation to the good of the holding or the estate and the cultivation and manufacture of indigo and erection of buildings for such purpose are not sufficient grounds.³⁸ Nor, the increase of income consequent upon the acquisition is a reasonable and sufficient purpose.³⁹ No appeal lies against the order of the Civil Court.⁴⁰

A notification in the official Gazette, that the land is likely to be needed for a public purpose, or for a company and the public notice of the substance of such notification, given in convenient places in the locality, are the conditions precedent to a preliminary local enquiry by a Government officer, or by any officer of the company authorised by the Government, for the purpose of ascertaining whether the land is adapted for such purpose and of making survey and measurement etc. of the land to be acquired. The enquiry need not be made in the presence or with the knowledge of the owner, and may even be made without any notice to him.⁴¹ But without such notification, an entry on the land by any person is a trespass, the principle being that all statutory conditions which have been imposed as conditions precedent to an entry on lands, must be strictly fulfilled.⁴² Any wilful obstruction, however, in doing any of the acts authorised by the statute is punishable by imprisonment for any term not exceeding one month, or fine not exceeding Rs. 50, or both.⁴³ The officer entering on the land must pay all necessary damage done, and in case of dispute as to the sufficiency of the amount, he shall refer the dispute to the Collector or other chief Revenue Officer of the district.⁴⁴

After the preliminary enquiries have been made and the Local Government satisfied that the land is really needed for a public purpose or for a company, a declaration, signed by the Secretary of the

Preliminaries.
i. Notifica-
tion.

ii. Declara-
tion.

36. Narain Mahto v. Brojo Behari 9 C.W.N. 472.

37. Goghun v. Rumeshur 18 Cal. 271 F. B.; Narain Mahto v. Brojo Behari 9 C.W.N. 472.

38. Goghun v. Rumeshur 18 Cal. 271 F. B.

39. Narain Mahto v. Brojo Behari 9 C.W.N. 472.

40. Goghun v. Rumeshur 18 Cal. 271

F.B.; Peeri Mohan v. Baroda 19 Cal. 485.

41. S. 4 L. A. Act I of 1894; Ezra v. Secy. of State 30 Cal. 36; 7 C. W. N. 249.

42. G. W. Rail. Co. v. Swindon &c. Rail. Co. (1884) 9 App. Cas. 787; N. S. Rail. Co. v. Pion (1889) 11 App. Cas. 612; in re Doyne (1883) 24 L. R. Ir. 287.

43. S. 16 L. A. Act I of 1894.

44. S. 5 L. A. Act I of 1894.

LECTURE II. Local Government or such other competent officer, shall then be made that the particular land is needed for a public purpose or for the company. The declaration shall be published in the official Gazette and shall state the particulars of the land intended to be acquired and the purpose for which it is needed.⁴⁵ If there are mines under the land to be acquired the Local Government may publish a declaration either (*a*) to pay compensation for the mines and minerals, or (*b*) to pay compensation for the restriction imposed upon the working of such mines.⁴⁶

Purpose must be stated.

The intention of the Government to acquire need not be declared in any particular form; it may be made in any form so long as the object is patent.⁴⁷ But the purpose must be stated in the declaration which is the conclusive evidence that the land is needed for a public purpose, or for a company for the construction of some work useful to the public.⁴⁸ Objects, connected with public health, safety, convenience and education, are "public purposes," which need not be of a permanent character.⁴⁹

Effect of declaration.

The declaration binds the Collector. He cannot acquire any land beyond the boundaries given in the declaration, even upon the payment of additional compensation.⁵⁰ But, except where the land has become permanently unfit for temporary occupation, or where possession has been taken, the Government is at liberty to withdraw from the acquisition of any land on payment of compensation for the damage suffered by the owner, in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the acquisition proceedings.⁵¹

Under S. 78 Calcutta Improvement Act V (B. C.) of 1911 the Board may abandon the acquisition of the land in consideration of

45. S. 6 L. A. Act I of 1891 ; S. 29

(B. C.) of 1911.

(c) B. I. Act IV (Bo. C) of 1898.

49. Ram Chandra v. Ahmedabad

46. S. 5 L. A. (Mines) Act XVIII of
1885.

Municipality 21 Bom. 600 ; Ezra v. Sec.
of State 30 Cal. 36 ; 7 C.W.N. 219 ;

47. Harish Chandra v. Sec. of State
11 C.W.N. 875.

Akshoy Kumar v. Commr. of Port of
Calcutta 33 Cal. 1243.

48. S. 6 L. A. Act I of 1891 ; Ram
Chandra v. Ahmedabad Municipality 21
Bom. 600 ; Ezra v. Sec. of State 30 Cal.
36 ; 7 C.W.N. 219 ; S. 29 B. I. Act IV
(Bo. C.) of 1898 ; Ch. III C. I. Act V.

50. Harish Chandra v. Sec. of State
11 C.W.N. 875 ; Gajendra v. Sec. of
State 8 C. L. J. 39.

51. S. 36. 18 L. A. Act I of 1894.

payment by the owner of a sum fixed by the Board, before the Collector has taken possession under S. 16 L. A. Act I of 1894.

The effect of declaration is to establish a relation, analogous in some respects to that of purchaser and vendor. The rights and obligations so created are legal, as distinct from equitable, and they bind all persons claiming under the owner with or without notice.⁵² The declaration, however, does not prevent the owner dealing with his property; it only fixes the interest in respect of which he can claim compensation and determines the time at which the value of that interest shall be considered for the purposes of the assessment of compensation; in other words, the interest in respect of which compensation is to be assessed cannot be varied after the declaration.⁵³ But though he cannot deal with such lands so as to increase the burden as regards the compensation to be made, but subject thereto, he may sell or convey it, or in other words, deal with it, and the right to be paid compensation may be assigned and dealt with as property.⁵⁴

The Collector, when authorized by the Local Government, shall cause to be given, at convenient places or near the land to be taken, public notice of the intention of the Government to take possession of the land. It shall contain accurately the particulars of the land so needed, so as to give full particulars to the owners of the land, and shall require all persons interested in it to state, within not less than 15 days from the date of the publication, the nature of their respective interests in the land, the amount and particulars of their claims to compensation for such interest and their objections (if any) to the measurement. The Collector shall also serve a similar special notice on the occupier of the land and all persons known or believed to be interested therein, that is, all persons claiming an interest to the compensation to be made on account of the acquisition of the land, including a person interested in an easement affecting the land.⁵⁵

iii. Collector's notice.

52. Tiverton and N. D. Rail. Co. v. Loosmore (1881) 9 App. Cas. 480; 53 L. J. 812; Mercer v. Liverpool etc. Rail. Co. (1903) 1 K. B. 652 C. A., aff. (1904) A. C. 461; Wild v. Woolwich Borough Council (1909) 2 Ch. 287; aff. (1910) 1 Ch. 35.

53. Ss. 23 (1) 24 (1) L. A. Act I 1894; see also S. 49 B. I. Acts IV. (Bo. C.) of 1898; S. 10 Sch. C. I. Act V (B. C.) of 1911.

54. Mercer v. Liverpool etc. Rail. Co. (1903) 1 K. B. 652 C. A. aff. (1904) A. C. 461; Dawson v. G. N. etc. Rail. Co. (1905) 1 K. B. 260; Jotoni Chowdhurani v. Amar Krishna 13 C. W. N. 350; 6 C. L. J. 715; 1 Ind. Cas. 161; Amor Chandra v. Ram Sundar 13 C. W. N. 357; 1 Ind. Cas. 15.

55. Ss. 7, 8, 9 L. A. Act I of 1894; for the mode of service of notice see S. 15 L. A. Act I of 1894.

LECTURE II. He may also require any such persons to deliver to him the names of persons having interest in the land, the nature of the interest and the profits of the last three years.⁵⁶ The owners of the interest in the subsoil in the streets or highways, although in the majority of cases no substantial claim could be maintained, are entitled to the same protection as the surface owners.⁵⁷ The particulars of the land should be accurate and clear and sufficiently stated to enable all persons interested in the land to know what land is actually being taken.⁵⁸ Under S. 557 (a) Calcutta Municipal Act III (B.C.) of 1899, it is open to, but not obligatory on, the Chairman of the Corporation of Calcutta to exercise the functions of the Collector.⁵⁹

Non-compliance with notice.

The object of the notice is to enable the Collector who acts as the agent of the Government or of the company for which the Government takes up the land, to make a full and comprehensive enquiry for the purpose of enabling the Government to make a tender of compensation to the persons interested by bringing before him all necessary parties and available materials. Where a person refused to comply with that notice or waived it or declined to appear merely on the ground that no notice had been served upon him, although he knew of the proceedings which were conducted and completed *bona fide*, he could not set up his claim against acquisition.⁶⁰ But if the Collector wilfully and perversely refuses to give notice to a person interested, his proceedings are inoperative in vesting the land in the Government.⁶¹ If, however, the notice substantially complies with the requirements of the law and the persons entitled to a notice is not in any way misled or damaged by it, the notice is good.⁶² Where the notice is defective, or where damages are ascertained subsequent to the acquisition proceedings, a suit for damages is maintainable in the Civil Courts, notwithstanding an award has been made by the Collector.⁶³

56. S. 10 L. A. Act I of 1891.

57. Goodson v. Richardson (1874) L. R. 9 Ch. 221; 13 L. J. Ch. 790.

58. Errington v. M. D. Rail. Co. (1883) 19 Ch. D. 559; 51 L. J. Ch. 505; Rameswar v. Sec. of State 34 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669.

59. Sec. of State v. Belchambers 33 Cal. 396; 10 C. W. N. 289; 3 C. L. J. 169.

60. Thomas v. Daw (1866) 2 Ch. App. 1; 36 L. J. Ch. 201; Sec. of State v. Bishan Dat 33 All. 376; 9 Ind. Cas. 423;

8 All. L. J. 115.

61. Rameswar v. Sec. of State 34 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669; Gangaram v. Sec. of State 30 Cal. 576; Administrator-General v. L. A. Coll. of 24 Pergs. 12 C. W. N. 241; Mahadevi v. Neelamani 20 Mad. 269.

62. Hari Pandurang v. Sec. of State 27 Bom. 421; Gangaram v. Sec. of State 30 Cal. 576.

63. Rameswar v. Sec. of State 34 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669.

A notice is not in itself a contract of sale until the price has been ascertained, nor is it a step putting in force compulsory powers but is an act of a neutral character. The land remains the property of the owner.

The Collector shall then enquire into the objections, if any, of the persons interested, and make an award of (i) the area of the land (ii) the compensation allowed for the land and (iii) the apportionment of the compensation among the persons interested in the land, whether or not they have appeared before him.⁶⁴ For the purpose of enquiries the Collector shall have power to summon and enforce the attendance of witnesses and to compel the production of documents in accordance with the provision of C. P. C. Act V of 1908.⁶⁵ The proceedings before the Collector are, however, executive in their nature.⁶⁶ He is the expert official charged with the duty of fixing the sum which in his best judgment is the value of the land and should be offered for it.⁶⁷ He had to collect all necessary information to enable him to arrive at a fair and full adjudication of all claims and interests. An intentional omission to give him the required information is punishable under Ss. 175 and 176 I. P. C.⁶⁸ But as he does not act judicially, he cannot take cognisance of such offences as perjury or forgery.⁶⁹

The Collector is quite competent to hold the enquiry at his office situate in one of the several districts over which he has jurisdiction, and in making his award he is not limited to the evidence taken before him, but he is entitled to avail himself of information supplied him without the knowledge of the owner and not disclosed at the enquiry.⁷⁰ The local authority or company, on whose behalf the land is being acquired, may appear before a Collector and adduce evidence for the purpose of determining the amount of compensation.⁷¹

LECTURE II

iv. Collector's enquiry.

64. S. 11 L. A. Act I of 1894.

in re Esufali 10 Bom. L. R. 994.

65. S. 14 L. A. Act I of 1894.

68. S. 10. (2) L. A. Act I of 1894.

66. Ezra v. Sec. of State 30 Cal. 36; 7 C. W. N. 249; B. I. S. N. Co. v. Sec. of State 38 Cal. 230; 15 C. W. N. 87; 12 C. L. J. 505.

69. Durga Das v. Queen Empress 27 Cal. 820; Ezra v. Sec. of State 30 Cal. 36; 7 C. W. N. 249.

67. Per Lord Robertson in Ezra v. Sec. of State 32 L. A. 93; 32 Cal. 605; 9 C. W. N. 454; 1 C. L. J. 227.

70. Ezra v. Sec. of State 32 L. A. 93; 32 Cal. 605; 9 C. W. N. 454; 1 C. L. J. 227.

71. S. 59 L. A. Act I of 1894

LECTURE II.

a. Area.

The Collector is to find out the precise quantity of land notified for acquisition within the special boundary. If an erroneous boundary has been given, the Collector cannot cure the mistake.⁷² Where the land actually taken up is different from that mentioned in the declaration, the proceedings of the Collector are void.⁷³

b. Compensation.

Each parcel of land and all interests in it should be dealt with as a whole. The Collector should not split up such interests and value them separately and independently, e.g. a landlord's interests and a tenant's interests in the same land, or land and buildings standing thereon, as distinct things to be valued apart from each other.⁷⁴

c. Apportionment.

When a dispute arises as to the apportionment of the compensation, or to any part of it, or to the persons to whom the same or any part thereof is payable, the Collector cannot decline to decide questions of title on the ground of want of jurisdiction, nor should he settle the amount of compensation due to some of the claimants and refer the case of the others to the Court.⁷⁵ Two courses are open to him; he may either make his award in favour of the persons whom he considers entitled to the compensation money and leave it to the dissatisfied persons to apply to him for a reference to the Court, or instead of making an award, refer on his own motion the dispute to the decision of the Court.⁷⁶

v. Collector's award.

Where the compensation money is apportioned, the particulars of such apportionment should be set out in the award. The award includes the decision as to the amount of compensation and its apportionment among the claimants.⁷⁷ When the Collector refuses to make an award, the only remedy of the land-owner is to claim damages for the breach of the statutory duty by the Collector.⁷⁸ If the mines under the land are not needed, the Collector shall insert such a statement in his award.⁷⁹ The award is binding upon the Government, as the value, fixed by its own administrative officer,

72. Harish Chandra v. Sec. of State 11 C. W. N. 875.

73. Gajendra Sahu v. Sec. of State 8 C. L. J. 39.

74. Dunia Lal v. Gopi Nath 22 Cal. 520; Govt. of Bombay v. Esufali 34 Bom. 618; 5 Ind. Cas. 621; 12 Bom. L. R. 34.

75. Govt. of Bombay v. Esufali 34 Bom. 618; 5 Ind. Cas. 621; 12 Bom.

L. R. 34; Dunia Lal v. Gopi Nath 22 Cal. 520; Harrish Chandra v. Bhoba Tarini 8 C. W. N. 321.

76. Ss. 18, 30 L. A. Act I of 1891.

77. Balaram Bhramaratar v. Sham Sunder 23 Cal. 526.

78. Mantharavadi v. Sec. of State 27 Mad. 535.

79. S. 3 (2) L. A. (Mines) Act XVII of 1885.

cannot be reopened at its own instance. Nor, is it competent to the Government to interfere and modify that sum.⁸⁰ Where the claimants agree in the apportionment of the compensation, that is make no objection to it, the award shall be conclusive evidence of the correctness of the apportionment.⁸¹ Such award, when filed in the Collector's office, shall be final and conclusive evidence, as between the Collector and the person interested, of the true area and value of the land and the apportionment of the compensation among the persons interested, immediate notice of which shall be given to such of the interested persons as were not present when the award was made.⁸² It is final as regards those persons who, though they had notice, did not appear before the Collector, for they are not permitted to agitate their rights on a reference.⁸³ As regards all other persons, the award is final as to those who do not within the statutory period apply for a reference.⁸⁴ But the award will not bind those who have not been made parties before the Collector, nor, is it final and conclusive as between the parties *inter se*, nor, does it amount to an adjudication of any question regarding their respective shares on apportionment and a Civil Court has jurisdiction to determine their rights.⁸⁵ To give validity to the award, the statutory provisions and requirements must be strictly complied with.⁸⁶ Thus, an award of nominal compensation is not a compliance with the provisions of the statute.⁸⁷ The Collector having once made his award is *unctus officio* and cannot reopen it.⁸⁸ The High Court has no jurisdiction to revise an award, as the Collector is not a Court.⁸⁹

80. Dossabhai v. Special Officer, Salsette; 36 Bom. 599; 11 Bom. L. R. 592; Special Officer, Salsette v. Dossabhai 37 Bom. 506; 17 C. W. N. 121; 11 Bom. L. R. 1194.

81. S. 29 L. A. Act I of 1891; in re Award by L. A. Officer, Karachi v. Lakhmibai 11 Ind. Cas. 301.

82. S. 12 L. A. Act I of 1891.

83. Ezra v. Sec. of State 32 I. A. 93; 32 Cal. 605; 9 C. W. N. 454; 1 C. L. J. 227.

84. Bhandi Singh v. Ramadhin Ray 10 C. W. N. 991; 2 C. L. J. 359; Nilmoni v. Rambundhu 8 I. A. 90; 7 Cal. 388; 10 C. L. R. 393.

85. Nilmoni v. Rambundhu 8 I. A.

90; 7 Cal. 388; 10 C. L. R. 393; Hurmutjan v. Padma Lochun 12 Cal. 33; Punnabati v. Pudmanand 7 C. W. N. 538.

86. Rameswar v. Sec. of State 34 Cal. 170; 11 C. W. N. 356; 5 C. L. J. 669.

87. Luchmeswar v. Darbhanga Municipality 17 I. A. 90; 18 Cal. 99.

88. Administrator General v. L.A.Coll. of 21 Perg. 12 C. W. N. 241; Harish Chandra v. Sec. of State 11 C. W. N. 875; Ladha Ebrahim & Co. v. Asst. Coll., Poona 12 Bom. L. R. 839.

89. B. I. S. N. Co. v. Sec. of State 38 Cal. 230; 15 C. W. N. 87; 12 C. L. J. 505.

LECTURE II. The Collector shall then tender payment of the compensation awarded by him to the persons interested according to the award : but if they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation, or as to the apportionment, the Collector shall deposit the money in the principal Civil Court of original jurisdiction.⁹⁰ But when the mines under the land have not been inserted in the declaration, he need not tender compensation in respect of them.⁹¹

Reference and its object,

Any person interested, who has not accepted the award, may, by a written application to the Collector, require that the matter be referred by him for the determination of the Court. Such application shall state the grounds on which the objection to the award is taken and shall be made within six weeks from the date of the award, if he was present before the Collector, and in other cases within six weeks of the receipt of the Collector's notice of the award, or within six months from the date of the Collector's award, whichever period shall first expire.⁹² An actual payment of compensation money is not necessary to the completion of the award.⁹³ But it is doubtful whether any such application can be made after the money has been actually paid away.⁹⁴

The object of the reference is to secure a speedy and judicial ascertainment of the whole amount of compensation payable and the persons to whom it is payable who set up conflicting claims, one against another.⁹⁵ An independent tribunal should, therefore, decide between the person who objects to an award and the Collector by whom it is made. Under the City of Bombay Improvement Act IV (Bo.C.) of 1898 and the Calcutta Improvement Act V (B.C.) of 1911, a Tribunal which, though not a Court, has been constituted to perform the functions of the Court under the L. A. Act I of 1894.⁹⁶ The Judge or the President of the Tribunal should himself decide the case having regard to the evidence before him and the circumstances of the case, what is the fair compensation for the land

90. S. 31 L. A. Act I of 1894.

Chandra v. Yakub Ali 17 C. W. N. 1057.

91. S. 3(2) L. A. (Mines) Act XVIII of 1885.

Roghunath v. Coll. of Dacca 11

92. S. 18 L. A. Act I of 1894.

C. L. J. 612; Hemanta Kumari v. Hari

93. Miran Bakhsh v. Feroge Din 14 Ind. Cas. 53.

Charan 5 C. L. J. 301; Imdad Ali v. Coll.

94. Gobinda Ranee v. Brinda Ranee 35 Cal. 1104; 12 C. W. N. 1039; Jogesh

of Farakhabad 7 All. 817; Nobodeep v.

Brojendra 7 Cal. 406; 9 C. L. R. 117.

95. Hari Pandurang v. Sec. of State 27 Bom. 424 at p. 444.

acquired.⁹⁷ A person who has received the money under protest as to the sufficiency of the amount, is not precluded from applying for a reference.⁹⁸ The title of the person to the land and the compensation need not be admitted.⁹⁹ A person, who *claims* to be interested in the acquisition, can apply for a reference.¹⁰⁰

The L. A. Act I of 1894 does not apply to Crown lands, for the Government being competent to devote any such lands to a public purpose, it is a contradiction in terms to say that the Government are compulsorily acquiring those of which they are already the owners.¹⁰¹ But if the lands have been parted with in such a way as to create a limited right to hold and use them in favour of a subject, before utilising the lands for a public purpose, the partial interest in them has to be acquired. Hence, where the Collector claims the lands as the property of the Government and denies the title of other claimants, he has no power to make a reference to the Judge; and neither the Secretary of State, nor the Company for whose benefit the lands are being acquired, can claim a reference.¹⁰² The observance of the formalities is a condition precedent to the Collectors' power of reference.¹⁰³ Up to, and including, the time of making his award, the proceedings before the Collector are not judicial proceedings, but when an application is made to him requiring him to refer the matter to the Civil Court, the Collector has to determine judicially, whether the application should be granted or not, on the ground that the formalities have been complied with. The written application makes it incumbent on him to make a reference and his order refusing an application is subject to revision

Reference in
favour of
Local Govt.
or company.

97. Fink v. Sec. of State 31 Cal. 599; Hughli Mills v. Sec. of State 12 C. L. J. 489.

Aiyaon Pillay 9 Ind. Cas. 342; 9 M. L. T. 272; 2 M. W. N. 367.

98. S. 31 L. A. Act I of 1894.
99. Husaini v. Husaini 17 All. 573
F. B.; Hemanta Kumari v. Hari Charan 5 C. L. J. 301; Queen v. C. Rail. Co. (1869) L. R. 4 Q. B. 320.

100. Ezra v. Sec. of State 30 Cal. 36; 7 C. W. N. 249; Galstaun v. Sec. of State 19 C. W. N. 195; Hemanta Kumari v. Hari Charan 5 C. L. J. 301; Queen v. C. Rail. Co. (1869) L. R. 4 Q. B. 320.
101. Govt. of Bom. v. Esufali 34 Bom. 618; 5 Ind. Cas. 621; 12 Bom. L. R. 34; Dy. Coll. Calicut Division v.

102. S. 50 L. A. Act I of 1894; see Babajan v. Sec. of State 4 C. L. J. 256; Govt. of Bombay v. Esufali 34 Bom. 618; 5 Ind. Cas. 621; 12 Bom. L. A. 34; Imdadali v. Coll. of Farakhabad 7 All. 817; Crown Brewery v. Coll. of Dehradun 19 All. 339; B. I. S. N. Co. v. Sec. of State 38 Cal. 230; 15 C. W. N. 87; 12 C. L. J. 505; Municipal Corporation v. Jogendra 13 C. W. N. 116.

103. In re Govt. and Nanu Kothare 39 Bom. 275; in re Rustomji Jijibhai 30 Bom. 341; 7 Bom. L. R. 881.

LECTURE II.

by the High Court.¹⁰¹ If at any time before the award is actually made, any question arises as to whether any land proposed to be taken does or does not form part of a house, manufactory or building, the Collector shall on the application for such a reference, refer the determination of such question to the Court.¹⁰² Where the Collector refuses to make a reference, the High Court in revision is competent to set aside the proceedings.¹⁰³

Contents of
reference.

In making the reference, the Collector shall state in writing (*a*) the particulars of the land (*b*) the names of persons interested (*c*) the amount awarded for damages under Ss. 5 and 17, and the amount of compensation awarded under S. 11 and (*d*) if the objection be to the amount of compensation, the grounds on which the amount of compensation was determined. To this, shall be attached a schedule of notices served and of the statements in writing made and delivered by the parties interested.¹⁰⁴ If the mines lying under the land are not needed, the Collector shall insert a statement to that effect in the reference.¹⁰⁵ By requiring the Collector to state in the reference to the Court the grounds on which the amount of compensation was determined, a safeguard is provided against any arbitrary award being made.¹⁰⁶ On a proper reference being made, the burden of proof that the compensation is inadequate, rests with the claimant.¹⁰⁷

The Collector is not bound by the period of limitation imposed on persons who have not accepted the award, in as much as he can, of his own motion make a reference.¹⁰⁸ But it is doubtful whether S. 12 of the Limitation Act IX of 1908 applies to an application by an objector for reference.¹⁰⁹

Court's power
on reference.

The Court shall then serve notices on all persons, interested in the objections, including the applicant, in order to adjudicate upon all the objections involved in the reference, and on the Collector if the

101. Administrator-General v. L. A. Coll. of 21 Pergs. 12 C. W. N. 211; B. L. S. N. Co. v. Sec. of State 38 Cal. 230; 15 C. W. N. 87; 12 C. L. J. 505; *in re Rustomji Jijibhai* 39 Bom. 311; 7 Bom. L. R. 881.

102. S. 19 L. A. Act I of 1894.

103. Krishna Das v. L. A. Coll., Patna 16 C. W. N. 327; 13 Ind. Cas. 170.

104. S. 19 L. A. Act I of 1894.

105. S. 3(2) L. A. (Mines) Act XVIII

of 1885.

106. Madhusudan v. Coll. of Cuttack 6 C. W. N. 106; Harish Chandra v. Sec. of State 11 C. W. N. 875.

107. Madhusudan v. Coll. of Cuttack 6 C. W. N. 406.

108. S. 30 L. A. Act I of 1894; Punnabati v. Padmanand 7 C. W. N. 538.

109. *In re Government and Nanu N. Kothare* 39 Bom. 275.

objection be with regard to the area or to the amount of compensation.¹¹³ The Court of reference is a Court of special jurisdiction, the powers and duties of which are strictly defined by the statutes.¹¹⁴ It is not therefore open to the Judge to question the legality of the acquisition and to hold that the acquisition has been *ultra vires*.¹¹⁵

The Court has power, upon a reference, to decide what compensation shall be awarded and to whom it shall be paid.¹¹⁶ The fact, that the compensation-money has been paid out, does not oust the jurisdiction of the Court to entertain a reference duly made.¹¹⁷

As the Collector acts as the agent of the Government or of the company for whom the Government takes up the land, the amount awarded by him as compensation cannot be disputed by them; in other words the amount awarded by the Court can in no case be less than what was awarded by the Collector. When the claimant has made a claim before the Collector, the amount awarded to him shall not exceed this amount. When the claimant has refused or omitted to make such claim without sufficient reason, the amount awarded to him by the Court shall not exceed the amount awarded by the Collector. When the claimant has omitted for a sufficient reason to make such claim, the amount awarded by the Court may exceed, but shall never be less than, the amount awarded by the Collector.¹¹⁸ But the whole question as to how the compensation is calculated is reopened, so that the Court may determine whether the individual claimant is entitled to more than what has been awarded to him; or where the property is divided into integral self-contained portions but treated throughout as a whole, the Court has power to deal with the Collector's valuation of the separate items and award less to a portion than what the Collector awarded for it, for although the Court is forbidden from giving less than the total amount awarded by the Collector, it is free to deal with the amount allotted by him to a particular item.¹¹⁹

113. S. 29 L. A. Act I of 1894.

116. Taylor v. Coll. of Purnea 11 Cal.

423; Husaini v. Husaini 17 All. 573 (F.B.)

117. Jogesh Chandra v. Yakub Ali 17 C. W. N. 1057.

118. S. 25 L. A. Act I of 1894; See. of State v. Govind Lal 12 C. W. N. 263.

119. Gangadhar v. Dy. Coll., Madras 22 M. L. J. 379; 11 M. L. T. 327; Indo-Burma Petroleum Co. v. Coll. et Yenangyagung 12 Ind. Cas. 202.

114. B. I. S. N. Co. v. Sec. of State 38 Cal. 230; 15 C. W. N. 87; 12 C. L. J. 505; Shyam Chunder v. Sec. of State 35 Cal. 525; 12 C. W. N. 569; 7 C. L. J. 445; Gajendra v. Sec. of State 8 C. L. J. 39.

115. Ezra v. Sec. of State 30 Cal. 36; 7 C. W. N. 219, aff. 32 I. A. 93; 32 Cal. 605; 9 C. W. N. 454; 1 C. L. J. 227.

LECTURE II.

The Court cannot, on a reference, determine only the amount of compensation payable for the land and refuse to decide the question of title to the land and to apportion the compensation among the claimants, directing them to seek their remedy by a civil suit.¹²⁰

Scope of enquiry.

The Court merely acts as an umpire and has no authority to consider collateral questions but can only deal with the objections which have been submitted to it, nor can it go into any questions raised before it for the first time.¹²¹ It cannot add parties on their own application and allow them to contest the award on a ground not raised in the reference, unless the claimant satisfies it that he had sufficient reason for refraining from making his claim in due time.¹²² The scope of the enquiry shall be restricted to the consideration of the interests of the persons affected by the objection *i.e.* interests of the persons raising the objections to the award and those of other persons affected thereby.¹²³ Questions, raised by the parties who did not and could not obtain any order of reference, cannot be gone into.¹²⁴ The question as to the total amount of compensation payable for the land should be separately dealt with from the enquiry as to the interests of the persons claiming compensation.¹²⁵ The determination of the value of the individual interests, exclusive of the interests of the other claimants to compensation, is possible only in a case where such interest is incapable of variation in a proceeding for apportionment.¹²⁶ If the original objector withdraws, the pro-

120. Harrish Chandra v. Bhoba Tarini 8 C. W. N. 321; Taylor v. Coll. of Purnea 14 Cal. 423; Balaram Bhramaratar v. Sham Sunder 23 Cal. 523; Nobodeep v. Brojendra 7 Cal. 406; 9 C. L. R. 117; Kashim v. Aminbi 16 Bom. 525 (F.B.); Hemanta Kumar v. Hari Charan 5 C. L. J. 301.

121. *In re Dare Valley Rail. Co.* (1865) L. R. 6 Eq. 429; Abu Bakar v. Peary Mohan 31 Cal. 451; Mohamand v. Srish 7 Ind. Cas. 10; Taylor v. Coll. of Purnea 14 Cal. 423; see however *in re Rustomji Dujibhai* 30 Bom. 341; 7 Bom. L. R. 881.

122. Sec. of State v. Govinda Lal 12 C. W. N. 263; Gobinda Kumar v. Debendra Kumar 12 C. W. N. 98; Prabal Chandra v. Peary Mohun 12 C. W. N. 987; Mahammad Sati v. Haran Chandra 12 C. W. N. 985; Mahamand v. Srish 12 C. W. N. 985; Mahamand v. Srish

7 Ind. Cas. 10.

123. S. 21 L. A. Act I of 1894; Kashi Prosad v. Sec. of State 29 Cal. 110; Trustees, Bombay Improvement v. Jalbhoy 33 Bom. 483; 11 Bom. L. R. 674.

124. B. I. S. N. Co. v. Sec. of State 38 Cal. 230; 35 C. W. N. 87; 12 C. L. J. 505; Promothi v. Rakhal 11 C. L. J. 420; Abu Bakar v. Peary Mohan 31 Cal. 451; Bejoy Chand v. P. K. Mojumdar 13 C. L. J. 159; 9 Ind. Cas. 582; Gobinda Kumar v. Debendra Kumar 12 C. W. N. 98; Mahammad Sati v. Haran Chandra 12 C. W. N. 985; Prabal Chandra v. Peary Mohun 12 C. W. N. 987.

125. Gulstam v. Sec. of State 10 C. W. N. 195.

126. Fink v. Sec. of State 34 Cal. 599.

ceedings are at an end.' But if one of the claimants, who objected to the amount of compensation offered by the Collector, withdraws or if he did not obtain an order of reference and the amount of compensation is increased at the instance of the other claimants, he can claim the benefits of the increased amount awarded by the Judge at the instance of the other claimants.¹²⁷

On a proper reference being made, the Collector's award is *prima facie* evidence that the amount awarded is the proper amount and the *onus* is on the claimant who takes the position of the plaintiff that the compensation awarded is inadequate.¹²⁸ But if the Collector makes no enquiry, or fails, in making a reference to the Court, to state the grounds on which the amount of compensation is determined, the burden is shifted on the Government who takes the position of the defendant.¹²⁹

procedure.

The provisions of the Civil Procedure Code apply to the proceedings before the Court.¹³⁰ Thus, where the proceedings are dismissed for want of prosecution, a suit is not maintainable for the trial of the question involved in the reference, but the party who seeks to have such questions tried and occupies the position of a plaintiff, must get the proceedings reversed under O. 9 r. 9 C. P. C. Act V of 1908.¹³¹ Where there are several references in which the parties are the same, the evidence is the same, and the plots of land are contiguous to one another and form parts of one estate, although in occupation of different tenants, the cases may be consolidated.¹³²

The Secretary of State is directly interested in the ascertainment of compensation, and no proceeding upon a reference can be valid in his absence.¹³³ The Court may make an order for discovery under

127. Nabin Chandra v. Dy. Commissioner of Sylhet 1 C. W. N. 562; Bejoy Chand v. P. K. Mojumdar 13 C. L. J. 159; 9 Ind. Cas. 582; cf. Kashi Prosad v. Sec. of State 29 Cal. 110.

128. Ezra v. Sec. of State 30 Cal. 36; 7 C. W. N. 249; Kishan Chand v. Jagannath 25 All. 133; Behari v. Nanda 11 C. W. N. 430.

129. Madhusudan v. Coll. of Cuttack 6 C. W. N. 406; Fink v. Sec. of State 34 Cal. 599; Harish Chandra v. Sec. of State 11 C. W. N. 875.

130. Ss. 53 and 54 L. A. Act I of

1891.

131. Behary v. Nanda 11 C. W. N. 430; Bhandi Singh v. Ramadhin Rai 10 C. W. N. 991; 2 C. L. J. 359.

132. Kashi Prosad v. Sec. of State 29 Cal. 140; Trustees, Bombay Improvement v. Jallbhoy 33 Bom. 483; 11 Bom. L. R. 671.

133. Municipal Corporation v. Jegendra 13 C. W. N. 116. The Court may add parties under O. 1 rr. 8 (2), 10 (2) (3) C. P. C. Act V of 1908; Kishan Chand v. Jagannath 25 All. 133.

LECTURE II. O. 11 r. 12 C. P. C. Act V of 1908.¹³⁴ Issues may be framed raising questions other than those specified in the reference.¹³⁵ Where the claim is withdrawn, not more than half the full fees of the pleader can be awarded under rule 36 (b) Ch. VI Rules and Circular Orders of High Court, Calcutta.¹³⁶ Proceedings in the Court of the Judge are not suits for money or suits for land within the meaning of rule 457 of the 4th April 1894 for the Courts subordinate to the High Court for the North Western Provinces. A pleader's fee should therefore be calculated according to rule 461.¹³⁷

Separate suit. The question as to the persons to whom the compensation is payable, may be determined either by a reference or by a suit.¹³⁸ But if a person has once made his choice and availed himself of a reference to the Court, he cannot again ask for an opportunity to litigate the same matter in an ordinary Court.¹³⁹ But where the Collector refuses to adjudicate a claim put forward, or where there has been no reference, a suit will be maintainable for the adjudication of the rights of the claimants *inter se*.¹⁴⁰ It is the duty of the Civil Court to set aside the proceedings of, and a reference by, the Collector which are contrary to the provisions of the Act.¹⁴¹ Nor, are the Civil Courts powerless to afford relief to a person aggrieved by proceedings taken in nominal compliance with statutory provisions.¹⁴² A separate suit is maintainable for damages which could not reasonably have been foreseen at the time of the proceedings,¹⁴³ or where

134. B. I. S. N. Co. v. Sec. of State 38 Cal. 230; 15 C. W. N. 87; 12 C. L. J. 505.

135. In re Rustomji Jijibhai 30 Bom. 341; 7 Bom. L. R. 881.

136. Nanhalal v. Sec. of State 11 C. L. J. 217.

137. Kanhaiya Lal v. Sec. of State 14 Ind. Cas. 214.

138. S. 31 L. A. Act I of 1894.

139. Bhandi Singh v. Ramchandran Rai 10 C. W. N. 991; 2 C. L. J. 359; Babajan v. Sec. of State 4 C. L. J. 256; Chowra Karan v. Yayyaprathee 29 Mad. 173.

140. Rameswar v. Sec. of State 34 Cal. 170; 11 C. W. N. 356; 5 C. L. J. 669; Nilmani v. Rambundhu & I. A. 90; 7 Cal. 388; 10 C. L. R. 393; Hurmutjan v. Padma Lochan 12 Cal. 33; Punjabati

v. Padmanand 7 C. W. N. 538.

141. Shyam Chunder v. Sec. of State 35 Cal. 525; 12 C. W. N. 569; 7 C. L. J. 115; Babajan v. Sec. of State 4 C. L. J. 256; Ladli Begam v. Rajee Rubia 13 Bom. 650.

142. B. I. S. N. Co. v. Sec. of State 38 Cal. 230; 15 C. W. N. 87; 12 C. L. J. 505; Luchmeswar v. Durbhauga Municipality 17 I. A. 90; 18 Cal. 99; Gaekwar v. Gandhi 30 I. A. 60; 27 Bom. 344; 7 C. W. N. 393; Rameswar v. Sec. of State 34 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669; Roghunath v. Coll. of Dacca 11 C. L. J. 612; 6 Ind. Cas. 457.

143. Rameswar v. Sec. of State 34 Cal. 170; 11 C. W. N. 356; 5 C. L. J. 669.

the statutory authority has been abused or exceeded.¹⁴⁴

If the land belongs to any person who has no power to alienate it, the Court shall order the money to be invested in the purchase of other lands, to be held under similar title and conditions of ownership and in the Government or approved securities, and until such investment direct the payment of the proceeds to the person entitled for the time being to the possession of the land, the costs of investment and all other reasonable charges and expenses being borne by the Collector.¹⁴⁵ Where a Hindu widow is appointed an executrix to the estate of her deceased husband but her power of enjoyment is restricted to the profit of the estate, she is none the less a person having no power to alienate it.¹⁴⁶ The protection thus enjoyed by reversionary heirs, when land is in the hands of limited owners, e. g., a widow or a shebait or a vatandar, should not by reason of the acquisition be completely withdrawn so as to prejudice them. When property is taken compulsorily from any person who is not *sui juris* and who is not competent to make the subsequent alteration in the disposition or devolution of that property which would naturally follow such a change, the presumption is that the legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever.¹⁴⁷ Thus, the money remains impressed with the character of real estate so that, until it passes into the hand of a person absolutely entitled to it, there is a constructive conversion of it into land.¹⁴⁸ But the Land Acquisition Judge can entertain and investigate an application by a limited owner to withdraw a portion of the compensation money in deposit to effect improvements upon the remainder of the trust property.¹⁴⁹

LECTURE II.

Re-invest-
ment.

144. Gaekwar v. Gandhi 30 I. A. 60; 27 Bom. 314; 7 C. W. N. 393; Rameswar v. Sec. of State 34 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669; Ricket v. M. Rail. Co. (1867) L. R. 2 H. L. 175; 36 L. J. Q. B. 205.

145. S. 32 L. A. Act I of 1891; cf. S. 80 L. Cl. C. Act 1845.

146. Trinayani v. Krishna Lall 39 Cal. 906; 17 C. W. N. 933; 6 Ind. Cas. 157.

147. Per James L. J., in re Barker (1881) 17 Ch. D. 241; Foster v. Foster (1875) 1 Ch. D. 588; Hopkinson v. Richardson (1913) 1 Ch. 284.

148. Kelland v. Fulford (1877) 6 Ch. D. 491; Ram Prasanna v. Sec. of State 40 Cal. 895; Mrinalini v. Abinash 14 C.W.N. 1024; 11 C. L. J. 533; Kamini Debi v. Promotho Nath 39 Cal. 33; 13 C.L.J. 597; 10 Ind. Cas. 491; Sheo Rattan v. Mohri 21 All. 354; Sheo Prasad v. Jaleha 24 All. 189; Mahammad Ali v. Ahammed Ali 26 Mad. 287; Shiva Rao v. Nagappa 29 Mad. 117; Coll. of Belgaum v. Bhim Rao 10 Bom. L. R. 657.

149. Kamini Debi v. Promotho Nath 39 Cal. 33; 13 C. L. J. 597; 10 Ind. Cas. 491.

LECTURE II.

When any compensation money is deposited in Court, the Court may, on the application of any party interested, or claiming an interest in such money, order the same to be invested in Government or other approved securities.¹⁵⁰ The money deposited is a debt for which it is necessary for the heirs to take out a certificate under the Succession Certificate Act VII of 1889.¹⁵¹

Judge's award
is a decree.

Every award shall specify the amounts awarded under each of the clauses under S. 23 L. A. Act I of 1894, together with the grounds of awarding each of the said amounts.¹⁵² An omission to do so by the Judge amounts to a material irregularity in the exercise of jurisdiction.¹⁵³ An order for investment of money deposited in respect of lands belonging to persons incompetent to alienate them, may be made in the award.¹⁵⁴ If the amount of compensation awarded by the Collector is inadequate, the Court may direct that the Collector shall pay interest at the rate of 6 p.c. per annum on the amount, over and above the amount awarded by him, from the date of his taking possession of the land to the date of payment of such excess into Court.¹⁵⁵ When the award of the Collector is not upheld, the costs incurred in the proceedings before the Court shall be paid by the Collector, unless the claim of the applicant was extravagant or he was negligent in putting his case before the Collector.¹⁵⁶

Effect of
award.

An award is not chargeable with stamp duty.¹⁵⁷ An adjudication as to compensation or apportionment is a decree.¹⁵⁸ But where the Judge does not go into the merits of the claim and does not decide anything, the order is not a decree.¹⁵⁹ An award refusing to restore a claim case disposed of *ex parte*, is not an award.¹⁶⁰

An adjudication of title between rival claimants by the Court concludes the question, and a person whose claim has been adjudicated upon, is not entitled to have the claim reopened and heard

150. S. 33 L. A. Act I of 1894.

151. Abinash Chandra v. Probodh Chandra 15 C. W. N. 1018; 13 Ind. Cas. 357.

152. S. 26 L. A. Act I of 1894.

153. Joseph v. Salt Co. 17 Mad. 371.

154. Shiva Rao v. Nagappa 29 Mad.

117.

155. S. 2^b L. A. Act I of 1894; Rangaswami v. Coll. of Coimbatore 5 Ind. Cas. 741; 7. M. L. T. 78.

156. S. 27 L. A. Act I of 1894.

157. S. 51 L. A. Act I of 1894.

158. Nilmoni v. Rambundhu & I. A. 90; 7 Cal. 388; 10 C. L. R. 393; Nilkanth v. Coll. of Thana 22 Bom. 802; Ladha Ebrahim & Co. v. Asst. Coll. of Poona 12 Bom. L. R. 839.

159. Harrish Chandra v. Bhoba Tarini 8 C. W. N. 321.

160. Hasun Mollah v. Tasiruddin 39 Cal. 393.

again in another suit¹⁶¹. When the adjudication is in respect of property other than that to which the enquiry relates, though the title thereto is the same, the decision is not *res judicata*.¹⁶² If the award says nothing as to damage for severance, it may be assumed that it is included in the amount, or that the Court has by silence decided that there was no damage in fact.¹⁶³

Although an award directing the refund of compensation money paid, does not amount to an award, it is enforceable under S. 36, O. 21 r. 30, C. P. C. Act V of 1908.¹⁶⁴ Even if C. P. C. does not apply, the Court has inherent power under general principles of law to compel restitution.¹⁶⁵ An order or award of the Tribunal is enforced by a Court of Small Causes, as if it were a decree of that Court.¹⁶⁶

An appeal shall lie to the High Court from the award or any part of the award.¹⁶⁷ An appeal lies to the High Court from an award of the Tribunal on the certificate of the President that the case is a fit one for appeal.¹⁶⁸ An order for the apportionment of compensation is appealable to the High Court.¹⁶⁹ An order directing investment of the compensation money, being an integral part of the award, is

Execution of award.

161. Nilmoni v. Rumbundhu 8 I. A. 90; 7 Cal. 388; 10 C. L. R. 393; Hurmatjan v. Paduri Lochan 12 Cal. 33; Punnabati v. Padmanand 7 C.W.N. 538; Ram Chunder v. Madho Kumari 12 I. A. 188; 12 Cal. 484; Chowra Karan v. Vayyaprath 29 Mad. 173; Bhandi Singh v. Rainadhin Rai 10 C. W. N. 991; 2 C. L. J. 359; Babujen v. Sec. of State 4 C. L. J. 256.

162. Durgaj v. Kali Charan 34 Cal. 466; 11 C. W. N. 525; Nobodeep v. Brojendra 7 Cal. 406; 9 C.L.R. 117; Mahadevi v. Neelamoni 20 Mad. 269; Basant v. Keshai 2 Ind. Cas. 853.

163. *In re Hayne* (1865) 13 W. R. 492; Duke of Beaufort & Swansea Harbour Trustees (1860) 29 L.J.C.P. 241.

164. Nobin Kali v. Banalata 32 Cal. 921; 2 C.L.J. 595; Kukkalangara v. Karala Varma 2 Ind. Cas. 931; 6 M.L.T. 139.

165. S. 144 C.P.C. Act V of 1908; Jogesh Chandra v. Yakub Ali 17 C.W.N. 1057; Meinalini v. Abinash 14 C.W.N. 1024; 11 C.L.J. 533; Coll. of Ahmedabad v. Lavji Mulji 35 Bom. 255; 10 Ind. Cas. 818; 13 Bom. L. R. 259; see contra Gobinda Ranee v. Brinda Ranee 35 Cal. 1104; 12 C.W.N. 1039.

166. S. 48 (10) B. I. Act IV (Bo. C.) of 1898; S. 77 C. I. Act V (B.C.) of 1911.

167. S. 54 L. A. Act I of 1894.

168. S. 48 (11) B. I. Act IV. (Bo. C.) of 1898; S. 3 (b) C. I. (Appeals) Act XVIII of 1911.

169. Bilaram Bhramiratar v. Sham Sunder 23 Cal. 526; Harrish Chandra v. Bhoba Tarini 8 C. W. N. 321; Poreshmath v. Sec. of State 16 Cal. 31; Sheo Rattan v. Mohri 21 All. 354; Municipal Commissioners of Bombay v. Abdul Huk 18 Bom. 185.

LECTURE II. appealable.¹⁷⁰ An award of costs is a part of the award and an appeal lies against such part.¹⁷¹ But an order directing the refund of the money,¹⁷² or an order rejecting an application by a person to be made a party on the ground that he has no *locus standi*¹⁷³ is not appealable. When an Assistant Judge makes an award and it is confirmed or set aside by the District Judge on appeal, no second appeal lies against the decision of the District Judge.¹⁷⁴ The respondent is entitled to object to the award under O. 41 r. 22 C. P. C. Act V of 1908.¹⁷⁵ There is no appeal to the Privy Council as of right from an order of a High Court, for the force of S. 54 L. A. Act I of 1894 is exhausted when the appeal to the High Court is heard.¹⁷⁶

The memorandum of appeal must be stamped as an appeal from an original decree and must bear the Court-fee stamp as provided by S. 8 Court-Fees Act VIII of 1870.¹⁷⁷ But where the Judge referred the claimant to a civil suit, the Court-fee payable is two rupees.¹⁷⁸ The decree awarded in appeal must be limited to the amount for which the Court-fees have been paid on the memorandum of appeal.¹⁷⁹

Suit for non-feasance, misfeasance etc.

No suit or proceeding shall be instituted against any person for any tortious act, in pursuance of anything done under the Act, without giving him a month's notice in writing of the intended proceeding and of the cause thereof.¹⁸⁰ Notice is required only when any tortious act is done under the Act.¹⁸¹ Where no notice

170. Trinayani Dasi v. Krishna Lal 39 Cal. 906; 17 C. W. N. 933; 6 Ind. Cas. 157; Shiva Rao v. Nagappa 29 Mad. 117.

171. Ekambara v. Muniswamy 31 Mad. 328; see *contra* under the old Act, Bamasoondaree v. Verner 22 W. R. 136; 13 B.L.R. 189.

172. Nobin Kali v. Banalata 32 Cal. 921; 2 C. L. J. 595; Gobinda Ranee v. Brinda Ranee 35 Cal. 1101; 12 C. W. N. 1039.

173. Golap Khan v. Bholanath 12 C. L. J. 545.

174. Nathubhai v. Manordas 36 Bom. 360; 14 Bom. L. R. 325.

175. Raghunath v. Sec. of State 29 Bom. 511; 7 Bom. L. R. 569.

176. Rangoon Botatoung Co. v. Coll. of Rangoon 39 I. A. 197; 40 Cal. 21; 17 C.W.N. 961; 16 C. L. J. 245; Special Officer, Salsette v. Dossabhai 37 Bom. 506; 17 C.W.N. 421; 14 Bom. L. R. 1194.

177. Sheo Rattan v. Mohri 21 All. 354; Trinayani v. Krishna Lal 39 Cal. 906; 17 C. W. N. 933; 6 Ind. Cas. 157.

178. Harrish Chandra v. Bhoba Tarini 8 C.W.N. 321.

179. Mahomed Ali v. Sec. of State 30 Cal. 501.

180. S. 52 L. A. Act I of 1894; Ss. 155, 156 C. I. Act V (B.C.) of 1911.

181. Kaminee Debia v. Protap Chunder 25 W. R. 163; Ezra v. Sec. of State 30 Cal. 36; 7 C.W.N. 249.

is served on the Secretary of State for India in Council under S. 80 of C. P. C. Act V of 1908, an injunction can be claimed by him.¹⁸²

A suit to recover compensation money improperly withdrawn, is maintainable.¹⁸³ A suit to recover compensation refused by the Collector is governed by Art. 120 Sch. I Limitation Act IX of 1908.¹⁸⁴ Art. 17 Limitation Act IX of 1908 refers to a suit for compensation for omission by the Collector to pay or deposit in Court the compensation money, while Art. 18 refers to a suit for compensation for refusal to complete the acquisition.¹⁸⁵ As between a landlord and tenant, the latter of whom has drawn out the whole compensation money, a suit by the former falls under Art. 62 or 122 of the Limitation Act IX of 1908.¹⁸⁶

When the Collector has made an award, he may take possession of the land which shall thereupon vest absolutely in the Government free from all encumbrances, even where no notice under S. 9 of the Act has been served.¹⁸⁷ If the Collector is opposed or impeded in taking possession, he shall, if a Magistrate, enforce a surrender of the land to himself; and if not a Magistrate, he shall apply to a Magistrate or (within the town of Calcutta, Madras or Bombay) to the Commissioner of Police.¹⁸⁸ Making a tunnel under, or throwing an arch over, a part of a house is taking possession of it.¹⁸⁹ The Collector cannot take possession of any land beyond the boundaries given in the declaration and if there is an error, the Judge or the Collector cannot rectify it.¹⁹⁰ The land taken vests absolutely in the Government and is discharged of all easements, appurtenant thereto.¹⁹¹ When the private rights of way over the land acquired,

LECTURE II.

Possession.

182. Hari Pandurang v. Sec. of State 27 Bom. 124; Sec. of State v. Rajluki 25 Cal. 239.

183. S. 31 L. A. Act I of 1894; Mrinalini v. Abinash 11 C. W. N. 1021; 11 C. L. J. 533.

184. Rimeswar v. Sec. of State 31 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669; James Hill v. Magistrate of Nuddea 11 W. R. 1.

185. Mantharavadi v. Sec. of State 27 Mad. 535; Rameswar v. Sec. of State 31 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669.

186. Khetter Kristo v. Dinedra 3

C. W. N. 202.

187. S. 16 L. A. Act I of 1894; Ganga Ram v. Sec. of State 30 Cal. 576.

188. S. 47 L. A. Act I of 1894.

189. Falkner v. S. & D. Rail. Co. (1873) L. R. 16 Eq. 158.

190. Harish Chandra v. Sec. of State 11 C. W. N. 875.

191. Taylor v. Coll. of Purnea 14 Cal. 423; in re Fenwick 14 W. R. Cr.

72; 6 B.L.R. App. 17; Col. of 21 Pergunnahs v. Nobin 3 W.R. 27; Eagle v. Charing Cross Rail. Co. (1867) L. R. 2 C. P. 638; Wigram v. Fryer (1887) 36 Ch. D. 87; 56 L. J. Ch. 1098.

LECTURE II.

were legally extinguished, evidence of subsequent trespass and user by the public will not avail to establish a new rededication to the public of a right of way over the land in question.¹⁹² The minerals under the land will also vest, unless the Collector makes a statement to the contrary, in the manner prescribed by S. 3 L. A. (Mines) Act XVIII of 1885.

If the mines lying under the land have not been acquired with the land, the persons entitled to work the mines shall give the Local Government 60 days' notice before the commencement of the working.¹⁹³ Upon such notice being given, the Local Government may publish a declaration of its willingness to pay compensation, either for the mines and minerals, or in consideration of the mines being worked, subject to such restriction as the Local Government may specify.¹⁹⁴ If no compensation is offered, the mines may be worked in a proper manner according to the usual manner of working such mines in the locality, although such working may absolutely destroy the surface.¹⁹⁵ But if any damage or obstruction is caused to the surface by improper working, it must be repaired.¹⁹⁶

The compulsory acquisition of land will not justify the infringement of the rights of others.¹⁹⁷ Thus, L. R. Act IX of 1890 confers on railway company to do certain things for the purpose of constructing a railway, or the accommodation of other works connected therewith which could not be lawfully done without them.¹⁹⁸ But in the exercise of these powers, the railway administration shall do as little damage as possible, and compensation shall be paid for any damage caused by the exercise thereof and the amount shall be determined in accordance with the provisions of the L. A. Act I of

192. G. C. Rail. Co. v. Balby &c. District Council (1912) 2 Ch. 110.

193. S. 4 L. A. (Mines) Act XVIII of 1885.

194. S. 5 L. A. (Mines) Act XVIII of 1885.

195. G. W. Rail. Co. v. Carpalla United China Clay Co. (1910) A. C. 83; G. W. Rail. Co. v. Bennett (1867) L. R. 2 H. L. 27; Howley Park Coal and Canal Co. v. N. W. Rail. Co. (1913) A. C. 11; N. W. Rail. Co. v. Budhill Coal & Sandstone Co. (1910) A.C. 46; New Moss Colliery Ltd. v. Lord Mayor &c.,

Manchester (1908) A.C. 117; Eden v. N. W. Rail. Co. (1907) A. C. 400.

196. S. 7 L. A. (Mines) Act XVIII of 1885; M. Rail. Co. v. Robinson (1889) 15 App. Cas. 19; G. W. Rail. Co. v. Blades (1901) 2 Ch. 624; *in re Todd Birlestion &c.* (1903) 1 K. B. 603.

197. Foster v. L. C. Rail. Co. (1895) 1 Q. B. 711; Raj Mohun v. E. I. Rail. Co. 10 B. L. R. 241.

198. Ss. 7, 8 and 9 L. R. Act IX of 1890. See Emsley v. N. E. Rail. Co. (1896) 1 Ch. 418.

1894.¹⁹⁹ The land acquired may be used for any purpose for which the statute authorises its use, although not the purpose for which it was professedly taken, provided it does not infringe the rights of others.²⁰⁰ Thus, lands acquired at the instance of the Port Commissioners are held by them for "public purposes," that is the purposes referred to in S. 38 Port Commissioners Act V (B. C.) of 1870.²⁰¹ So, a railway company purchasing land for the railway acquires solely for the purposes of constructing and using the railway.²⁰²

Municipal and other public bodies are sometimes given powers to take land beyond what is actually necessary for the execution of the proposed works, in order that some part at least of the improved value of the adjoining land may be secured in ease of the burden upon the ratepayers. These lands are authorised to be taken for the purpose of "recoupment," as the public body is empowered to sell or lease or otherwise transfer them at what may be the enhanced value.²⁰³

In cases of urgency, if the Local Government so directs, the Collector, though no award has been made, may after 15 days after publication of the notice under S. 9 (1) take possession of any waste or arable land needed for public purposes or for a company.²⁰⁴ Whenever owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any railway administration to acquire immediate possession of any land, the Collector may immediately, after the publication of the notice and with the previous sanction of the Local Government, take possession of such land.²⁰⁵ The Collector shall, at the time of taking possession, offer to the person interested, compensation for the standing crops and trees on such land and for any other damage

Recoupment.

Taking posses-
sion before
award.

199. S. 10 I. R. Act IX of 1890.

(1879) 13 Ch. D. 268.

200. Raj Mohun v. E. L. Raik Co. 10 B. L. R. 241; Luchmeswar v. Darbhanga Municipality 17 I. A. 90; 18 Cal. 99; Galloway v. Mayor & Commonalty of London (1866) L. R. 1 H. L. 34; 35 L. J. Ch. 477; Quinton v. Bristol Corporation (1874) L. R. 17 Eq. 524; Rolls v. South Shields Corporation (1899) 79 L. T. 685 C.A.

203. S. 556 C. M. Act III (B.C.) of 1899; S. 81 C. I. Act V (B.C.) of 1911. See Galloway v. Mayor & Commonalty of London (1866) L. R. 1 H. L. 34; 35 L. J. Ch. 477; Quinton v. Bristol Corporation (1874) L. R. 17 Eq. 524; Rolls v. South Shields Corporation (1899) 79 L. T. 685 C.A.

201. K. S. Bonnerjee v. Commissioners for the Port of Calcutta 3 C. L. J. 585.

204. S. 17 (1) L. A. Act I of 1894.

202. Norton v. L. & N. W. Rail. Co.

205. S. 17 (2) L. A. Act I of 1894.

LECTURE II.

caused by sudden dispossession.²⁰⁶ Under S. 557 (b) Calcutta Municipal Act III (B. C.) of 1899 "in the case of any area which is stated in a certificate by a Magistrate to be unhealthy," S. 17 L. A. Act I of 1894 is made applicable.

Temporary occupation.

Whenever it appears to the Local Government that the temporary occupation and use of any waste or arable land are needed for any public purpose or for a company, the Local Government may direct the Collector to procure the occupation and use of such land not exceeding three years. The Collector shall then give written notice to the persons interested in such land of the purpose for which it is needed, and pay compensation, either in a gross sum or by periodical payments. In case the Collector and the persons interested differ as to the sufficiency of the compensation or apportionment, the Collector shall refer the difference to the Court.²⁰⁷ On payment of such compensation, or on making a reference, the Collector may take possession of the land and use or permit the use thereof in accordance with the notice. On the expiration of the term, the Collector shall restore the land to the persons interested and make such compensation as may have accrued. But if the land has become permanently unfit for the purpose for which it was used, and if the persons interested so require, the Local Government shall acquire it.²⁰⁸

206. S. 17 (3) L. A. Act I of 1894.

208. S. 36 L. A. Act I of 1894.

207. S. 35 L. A. Act I of 1894.

LECTURE III.

Compulsory Sales for public purposes.

(Assessment and Division of Compensation.)

The principle of compensation is indemnity to the owner and hence the basis on which the amount of compensation or purchase-money is to be assessed for the land acquired, is its value to the owner at the date of the declaration under S. 6 L. A. Act I of 1894. An intention to take away property without compensation should not be imputed to the legislature, unless it be expressed in unequivocal terms.¹ The measure of compensation is not what the person who takes the land will gain by taking it, or what will be its value to him, but what the person from whom it is taken will lose by having it taken from him; in other words, the owner is entitled to receive, for the land he gives up, its proper equivalent.²

The market value of the land at the date of the declaration is an important element to be taken into consideration in determining what compensation should be paid for the acquisition.³ The exact meaning of the term "market value" is no where to be found in any of the Indian judicial decisions.⁴ But though exact valuation is practically impossible, the approximate market value is all that can be aimed at.⁵ "In all valuations there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to exact reasoning, or to explain to others."⁶ The question of market value is not a question of law but a question of fact, to be determined in various places and circumstances differently, by adopting such method of valuation as in the particular case would seem to be correct.⁷ Although, it would be unsafe to

Principles of assessment of compensation money.

Matters to be considered in determining the amount.

i. Market value: what it means.

1. Com. of Public Works v. Logan (1903) A. C. 355; W. C. Rail. Co. v. W. & A. Rail. Co. (1882) 7 App. Cas. 178.

2. Stebbing v. Metropolitan Board of Works (1870) L. R. 6 Q. B. 37; Manmatha Nath v. Sec. of State 24 L. A. 177; 25 Cal. 194; 1 C.W.N. 698; Sec. of State v. Charlesworth, Pilling & Co. (1901) A.C. 373; 28 I. A. 121; 26 Bom. 1; Wernicke v. Sec. of State 13 C. W. N. 1046; 2 Ind. Cas. 562.

3. S. 23 (1) L. A. Act I of 1894.

4. Wernicke v. Sec. of State 13 C.W.N. 1046; 2 Ind. Cas. 562.

5. Harish Chandra v. Sec. of State 11 C.W.N. 875.

6. Sec. of State v. Charlesworth, Pilling & Co. (1901) A.C. 373; 28 I. A. 121; 26 Bom. 1.

7. Bombay Improvement Trust v. Jalbhoj 33 Bom. 483 at p. 491; 11 Bom. L. R. 674.

LECTURE III. — make any inference from the practice prevailing in England, there is no difference between the value to the owner which forms the basis of compensation payable under the Land Clanses Consolidation Act of 1845, in England and the market value of the land under S. 23 L. A. Act I of 1894.⁸

The market value of the land means the price which would be obtainable in the market, if disposed of on the most profitable terms, for a concrete parcel of land with its particular advantages and drawbacks, both being estimated rather with reference to commercial value than with reference to any abstract legal rights or individual property of a particular purchaser.⁹ It is the price, which the owner willing, but not obliged, to sell, might reasonably expect to obtain from a willing purchaser under no necessity of having it.¹⁰ But the owner is not to be deprived of the most advantageous way of selling his land, *e.g.*, by selling in lots, by reason of the facts that it is subject to immediate acquisition.¹¹ Market value is to be considered with reference to a particular commodity in general and not as affected by circumstances connected with a particular holder of the commodity. All rights, which the person enjoys because of the ownership or occupancy, are to be considered in valuing the land, irrespective of consideration of what the acquirer will gain, or of any appreciation or depreciation of the land by reason of the acquisition.¹² Neither, the degree of urgency which has led to the acquisition, nor, any disinclination of the persons interested to part with the land to be acquired, nor, any sentimental grievance, such as, offerings to idols in a temple would have to be carried through the street and so lose their religious efficacy, should be taken into account.¹³

It is the particular piece of land that has to be valued including all interests in it. The market value is to be ascertained on the footing

8. Govt. of Bombay v. Merwanji Muncherji 10 Bom. L. R. 907.

9. Bombay Improvement Trust v. Jalbhoy 33 Bom. 483; 11 Bom. L. R. 674; Govt. of Bombay v. Merwanji Muncherji 10 Bom. L. R. 907.

10. Wernicke v. Sec. of State 13 C.W.N. 1046; 2 Ind. Cas. 562; Kailash Chandra v. Sec. of State 11 C.W.N. 209n; 17 C. L. J. 34.

11. Trustees, Bombay Improvement

v. Karsandas 33 Bom. 28; 10 Bom. L. R. 688; 1 Ind. Cas. 451; Govt. of Bombay v. Merwanji Muncherji 10 Bom. L. R. 907; Govt. of Bombay v. Karim Tar 33 Bom. 325; 3 Ind. Cas. 273; 10 Bom. L. R. 660.

12. S. 21 L. A. Act I of 1894.

13. S. 21 (1) and (2) L. A. Act I of 1894; Coll. of Poona v. Kashinath 19 Bom. 585 at p. 591.

that all separate interests combine to sell. Questions of title, which can affect only the rights of the parties interested, cannot be considered, as the Government have nothing to do with the title but have only to replace the property acquired with its equivalent in cash. The land and all interests in it should be dealt with as a whole ; such interests should not be split up and valued separately and independently. Thus, where the land has buildings on it, the market value should be assessed of the land with the buildings as one property.¹⁴ Similarly, land and trees should not be separately assessed.¹⁵ B. I. Act IV (Bo. C.) of 1898, S. 49 (2), does not effect a fundamental change in the methods of L. A. Act I of 1894.¹⁶ Market includes a possible market ; in order to exclude the particular value for a special purpose, there must be an affirmative finding that there was no reasonable possibility of a market. The interest of a public authority in the surface of a street extends only to so much thereof as is necessary for the control, protection and maintenance of the street as a highway and does not extend to the subsoil.¹⁷ If the person claiming compensation can make no use of the land, nor obtain any value for it in the market by reason of the restrictions on his ownership, he practically suffers no loss and is therefore entitled to merely nominal compensation.¹⁸ Thus, where a portion of the land acquired formed parts of public roads, no compensation was allowed, the subsoil having no market value.¹⁹

The period of time to be regarded in fixing the market value is the date of the publication of the declaration of the Local Government.²⁰ Any outlay or improvement on, or disposal of, land acquired,

Date of assessment.

14. *Dunia Lal v. Gopi Nath* 22 Cal. 820 ; *Govt. of Bombay v. Esufali v.* 34 Bom. 618 ; 5 Ind. Cas. 621 ; 12 Bom. L. R. 34.

15. *Sub. Coll. of Godavari v. Seragam Subraraydu* 30 Mad. 151 ; 16 M. L. J. 551 ; *Sec. of State v. Duma Lal* 13 C.W.N. 487.

16. *Bombay Improvement Trust v. Jalbhoy* 33 Bom. 483 ; 11 Bom. L. R. 674.

17. *Tunbridge Wells Corporation v. Baird* (1896) A. C. 431 ; 65 L. J. Q. B. 451 ; *Vestry of St. Mary Battersea v. County of L. & B. Provincial Electric Lighting Co.* (1899) 1 Ch. 174 ; 68 L. J. Ch. 238 ; *L. & N. W. Rail. Co. v. Westminster Corporation* (1904) 1 Ch. 759 ; 73 L. J. Ch. 386 ; see S. 30 B. M. Act III (B.C.) of 1884.

18. *Stebbing v. Metropolitan Board of Works* (1870) L. R. 6 Q. B. 37 ; *Sec. of State v. Charlesworth, Pilling & Co.* (1901) A. C. 373 ; 28 I. A. 121 ; 26 Bom. I. ; *Sec. of State v. Shanmugaraya* 20 I. A. 80 ; 16 Mad. 369.

19. *Mannatha Nath v. Sec. of State* 24 I. A. 177 ; 25 Cal. 494 ; 1 C.W.N. 698 ; *Chairman, Howrah Municipality v. Khetra Krishna* 33 Cal. 1290 ; 10 C.W.N. 1044 ; 1 C. L. J. 343.

20. S. 24 (1) L. A. Act I of 1894.

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commenced, made or effected without the sanction of the Collector after that date, should not be taken into account.²¹ Up to that time, an owner of the property may go on altering or adding to it and receive compensation in respect of the alterations and additions, although he might have known that the property would in all probability be taken.²² But mitters, which increase or reduce the value of the property after the declaration, are immaterial, provided the owner causes no wilful damage to it.²³ When, however, a fresh declaration becomes necessary, the date of the fresh declaration is the time to be regarded in assessing the value of the land.²⁴

The right to compensation accrues simultaneously with the right of the Government to take the acquired land.²⁵ Thus, the claimants are entitled to obtain as compensation only the market value at the date of the declaration, including such advance in value as has then taken place, and a speculative rise in the price is not to be taken into consideration in fixing the market value. So, any rise in value afterwards likely to accrue from the use to which the land is intended to be put, is to be excluded.²⁶

Experts.

In determining the market value much reliance cannot be placed on the evidence of experts, unless it is supported by, or coincides with, other evidence.²⁷

Personal knowledge.

Personal knowledge of the locality and inspection of the spot can be availed of in valuing the land.²⁸ An honest and useful valuation cannot, however, be made simply by visiting the land.²⁹ To hold that the L.A. Court having a specialized knowledge and useful experience,

21. S. 24 (7) L. A. Act I of 1891.

22. Higgins v. Dublin Corporation (1891) 28 L. R. Ir. Q. B. 484.

23. S. 24 (4) and (5) L. A. Act I of 1891; Bwllfa etc. Steam Collieries v. Pontypridd Water Works Co. (1902) 2 K. B. 135, aff. (1903) A. C. 426.

24. S. 49 L. A. Act I of 1891.

25. Manmatha Nath v. Sec. of State 24 I. A. 177; 25 Cal. 194; 1 C.W.N. 698.

26. S. 24 (4) L. A. Act I of 1891; Sec. of State v. Charlesworth, Pilling & Co. (1901) A. C. 373; 28 I. A. 121; 26 Bom. 1; Manmatha Nath v. Sec. of State 24 I. A. 177; 25 Cal. 194; 1 C.W.N. 698; Trustees, Bombay Improve-

ment v. Jalbhoy 33 Bom. 483; 11 Bom. L. R. 674; Chairman, Howrah Municipality v. Khetra Krishna 33 Cal. 1290; 10 C.W.N. 1044; 4 C.L.J. 343.

27. Harish Chandra v. Sec. of State 11 C.W.N. 875; Rajendra Nath v. Sec. of State 32 Cal. 343; *in re Dorabji Cursetji* 10 Bom. L. R. 675; Govt. of Bombay v. Karim Tar 33 Bom. 325; 3 Ind. Cas. 273; 10 Bom. L. R. 660.

28. Sec. of State v. Charlesworth, Pilling & Co. (1901) A. C. 373; 28 I. A. 121; 26 Bom. 1; Ezra v. Sec. of State 32 I. A. 93; 32 Cal. 605; 9 C.W.N. 454; 1 C. L. J. 227.

29. Rajendra Nath v. Sec. of State 32 Cal. 343.

its awards should not be lightly disregarded, would be a practical denial of the right of the High Court to revise the findings of the Special Judge.³⁰

Previous sales of the acquired land may be of great use in determining the market value of the land for acquisition purposes, if they are *bona fide* transactions. But, while on the one hand, an inadequate consideration may have been given for the land purchased, on the other, an extravagant amount may have been paid by the purchaser for special purposes of his own.³¹ Where the purchaser was aware of the acquisition proceedings, the price paid, whether at Court sale or at private sale, is of no value in determining the amount of compensation. Nor, the amount spent in the purchase and improvement of the land can be taken as the market value of the land, "for a man might spend a great deal of money on improvements and yet the result might be that the market value was not increased to the amount which he had thought fit to spend."³² Auction sales are not always in themselves reliable guides, as the properties often go for less than the real value. Probate valuations, as set out in petitions for probate, can be taken as evidence of what the claimants valued their lands at.³³

Awards of compensation for similar lands recently acquired in the neighbourhood may be admitted as evidence.³⁴ Similarly, the market value may be ascertained by means of recent sales of similar lands in the neighbourhood, but mere offer, as distinct from a sale and purchase, is only an expression of opinion on the part of the offerer.³⁵ Evidence of sales of precisely similar lands can scarcely be obtained. Differences, great or small, exist and what allowances should be made for such differences depend on a consideration of all the circumstances and can hardly be reduced to any hard and fast rule.

Modes of determining market value.

(a) Previous sales of the acquired land

(b) Sales of other lands

30. Anandaray v. Sec. of State 29 Bom. 565 : Trustees, Bombay Improvement v. Karsandas 33 Bom. 28 : 10 Bom. L. R. 688 ; 1 Ind. Cas. 451.

31. Chomu v. Umma 14 Mad. 46.

32. Per Couch, C. J., in Coll. of Hooghly v. Raj Kristo 22 W. R. 234 ; Sec. of State v. Kartick Chundra 9 C.W.N. 655.

33. Govt. of Bombay v. Merwanji Muncherji 10 Bom. L. R. 907.

34. Sec. of State v. I. G. S. N. & Rail. Co. 36 I. A. 200 ; 36 Cal. 967 ; 14 C.W.N. 134 : 10 C. L. J. 281 : 11 Bom. L. R. 3197 : 19 M. L. J. 648.

35. Fink v. Sec. of State 34 Cal. 599 ; Govt. of Bombay v. Merwanji Muncherji 10 Bom. L. R. 907 ; Municipal Commissioners v. Abdul Huk 18 Bom. 184 : Coll. of Poona v. Kashinath 10 Bom. 585 : in re Munji Khetsey 15 Bom. 279.

LECTURE III. Hence, valuations will vary according to the advantages or disadvantages, a particular plot of land possesses on account of its situation, or its proximity to important trade centres.³⁸ In arriving at a proper valuation regarding house sites, the value of the adjoining land is not to be the criterion, if it is unfit for building purposes.³⁷ The method of taking an average of instances of sales, or adding up the retail values of small plots of land, is crude and can only result in injustice to one side or the other.³⁸ The "sales that instance a bargain by a vendor who is not likely to give anything away and a purchaser who is anxious to buy the land on account of his owning the adjoining plot" are not safe guides.³⁹

(c) Frontage land.

The mode of valuation by division into belts is artificial and does not always afford a reliable guide to the ascertainment of the market value.⁴⁰ Frontage land, that is, "the land in immediate contiguity to a highway is a well known and powerful element in the value of all lands in populous districts."⁴¹ But it cannot be taken as a hard and fast rule that back land is worth half the frontage land.⁴² In determining the value of frontage land, the depth is of great importance. What is a suitable depth must depend on the character of the buildings in the locality.⁴³

(d) Capitalised value : rental.

Where no special principle is applicable, the income of the property, actual or imaginary, is one of the recognised starting points for a valuation ; but it is not the only element to be taken into consideration.⁴⁴ Nor, is the rental principle of valuation a satisfactory basis to go upon, where the property is not fully developed, as when the building on the land is incomplete and yields no rent.

36. Trustees, Bombay Improvement v. Karsandas 33 Bom. 28 : 10 Bom. L. R. 688 : 1 Ind. Cas. 451.

Muncherji 10 Bom. L. R. 907 : Govt. of Bombay v. Karim Tar 33 Bom. 325 :

3 Ind. Cas. 273 : 10 Bom. L. R. 660 : Sec.

of State v. I. G. S. N. & Rail. Co. 36

L. A. 200 : 36 Cal. 967 : 14 C.W.N. 134 :

10 C. L. J. 281 : 11 Bom. L. R. 1197 :

Alaul Huq v. Sec. of State 11 C. L. J.

393 : Roghu Nath v. Coll. of Dacca 11

C. L. J. 612 : 6 Ind. Cas. 457.

37. Venkatachariar v. Divisional Officer, Timmeyvelly (1912) M.W.N. 460.

43. Govt. of Bombay v. Karim Tar

33 Bom. 325 : 3 Ind. Cas. 273 : 10 Bom.

33 Bom. 325 : 3 Ind. Cas. 273 : 10 Bom.

L. R. 660 at p. 663.

11 C. L. J. 214.

38. Raghu Nath v. Coll. of Dacca 11

C. L. J. 612 : 6 Ind. Cas. 457.

C. L. J. 612 : 6 Ind. Cas. 457.

44. Raghu Nath v. Sec. of State

29 Bom. 514 : 7 Bom. L. R. 569 : in

re Sukhamand Gurumankhari 34 Bom. 496 :

11 Bom. L. R. 1176.

42. Govt. of Bombay v. Merwanji

A valuation on a rental basis should depend on the rents actually collected. The rent recoverable should be the normal rent and not speculative rent, based on a potential rise of the market, as rent cannot go on increasing for ever. If the land is let at a rack rent, payable by tenants at will and not by tenants with a permanent or occupancy right, such rent is the best criterion ; but where that is not the case, the question is to determine, what would be a fair and reasonable rent under ordinary circumstances.⁴⁵ Rental enhanced by reason of premises being used for an illegal purpose should not be taken into account.⁴⁶ The method of taking average rents of all the houses in the locality obviously disregards the particular advantages and disadvantages of the individual property.

Rent does not necessarily depend upon structural or capital value, though the latter depends upon the former. The value of a rent paying property depends upon its income, and capital once invested in land and buildings cannot be apportioned between them. Unless the property is divided into separate blocks with a separate user attached to each, it cannot be valued piecemeal, one portion on the rental basis and the remainder as vacant land. In determining the amount of compensation, distinction should be made between occupied and unoccupied lands, and in the case of the former, likelihood of vacancies.⁴⁷ In large towns, the present rental and a supposed increase thereon cannot be safely accepted as the basis of the valuation.⁴⁸ When neither the selling value, nor the letting value affords a reliable guide, the annual value of the produce of the land may afford a reliable guide.⁴⁹

The valuation should be made by capitalising the rental or annual value after making deductions for collection charges, repairs and other contingencies.⁵⁰ In valuing land within a Municipality, one-sixth of the Municipal assessment should be deducted for roadcess and other cesses and the balance estimated at 20 years' purchase.⁵¹ To find the number of year's purchase of the rent, the nature

45. See, of State v. Shannigaraya 20 I. A. 80 ; 16 Mad. 369.

46. S. 19 (5) B. I. Act IV (B. C.) of 1898.

47. Coll. of Hooghly v. Raj Kristo 22 W. R. 234.

48. Hughli Mills v. Sec. of State 12 C. L. J. 489.

49. Ram Sahoy v. Sec. of State 8

C. W. N. 671 ; Kailas Chandra v. Sec. State 14 C. W. N. 209n ; 17 C. L. J. 34.

50. See, of State v. Belchambers 33 Cal. 396 ; 10 C. W. N. 289 ; 3 C. L. J. 169 ; Biswa Rajan v. Sec. of State 11 Ind. Cas. 62.

51. Tulshi Makharia v. Sec. of State 11 C. L. J. 408.

LECTURE III. of the property, its situation, the rate of interest obtainable and other circumstances have to be considered.⁵² If a house is to be acquired, the life of the building, the possibility of having to rebuild it in the near future, the access to the house and the local Municipal laws have to be considered.⁵³

(e) Residence.

Residential properties may possess a value in the market, not for the return they give on the capital invested, but for the advantages and enjoyment which accrue from the possession. Such properties cannot be valued on the basis of hypothetical rent. The original cost is an important element for consideration. A man who purchases, for the purpose of residence, a house in a residential neighbourhood, will be willing to give a higher price than would be given by a prudent investor, who is assumed to regard his purchase from a purely mercantile point of view.⁵⁴

(f) Future utility : potential value.

The value of lands to an owner is enhanced by the probability of a more profitable future use ; hence its actual use with all its potentialities must be considered.⁵⁵ "The question for enquiry is, what is the market value of the property, not according to its present disposition but laid out in the most lucrative way in which the owner could dispose of."⁵⁶ The probable use to which the land may be put is necessarily an element to be taken into consideration, that is, its potential value should be considered, for its value is enhanced by the probability of a more profitable future use.⁵⁷ The principle is applicable, whether the owner has acquired the land in order to use it for some particular purpose, or whether he has no such present intention.⁵⁸ Indeed, the value of the owner's interest is not properly compensated by assessing merely the amount of pecuniary benefits obtained by past user, in utter disregard of possible benefits in the future.⁵⁹

52. Bhola Nath v. Heysham 11 B. L. R. 230 ; 17 W. R. 221 ; See. of State v. Sham Bahadoor 10 Cal. 769.

53. In re Sorabji Jamsetji 10 Bom. L. R. 696.

54. In re Sukhanand Gurumukhari 34 Bom. 486 ; 11 Bom. L. R. 1176.

55. Com. of Inland Revenue v. G. & S. W. Rail. Co. (1877) 12 App. Cas. 315.

56. Premchand v. Coll. of Calcutta 2 Cal. 103 ; Coll. of Poona v. Kashinath 10 Bom. 555 ; in re Munji Khetsey 15 Bom. 279 ; Bhujabalpa v. Coll. of Dhar

war 1 Bom. L. R. 454 ; Fink v. Sec. of State 34 Cal. 599 ; Alaud Huq v. Sec. of State 11 C. L. J. 393.

57. In re Gough &c. (1904) 1 K. B. 417 ; 73 L. J. K. B. 228 ; in re Lucas &c. (1909) 1 K. B. 16 C. A. ; Daya Khushal v. Asst. Coll., Surat 38 Bom. 37.

58. Bailey v. Isle of Thanet Light Rail. Co. (1900) 1 Q. B. 722.

59. Trent Strongton v. Barbadoes Water Supply Co. (1893) A. C. 502 ; 62 L. J. P. C. 123.

Future utility is a thing that people have an eye to, in buying land, and the market price of land is affected by it. Such future utility must be estimated by prudent business calculation and not by merely speculative and impracticable imagination.⁶⁰ The Court may take into account, not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events it might, within a reasonable period, be applied, just as an owner might do, if he were bargaining with a purchaser in the market.⁶¹ But the expected user should be immediately available and adapted to its locality.⁶² When a contingency cannot be anticipated or measured, such contingency ought not to be taken into consideration.⁶³

The special, though natural adaptability of the land for a particular, though not the purpose for which it is taken, such as the suitableness of the situation, its salubrity, its vicinity to a large and growing industrial or populous centre, is an important element to be taken into consideration in determining the market value of the land.⁶⁴ Thus, the land having a special adaptability, *e. g.*, for a rifle range, allowance was made for the same.⁶⁵ But it is not right to lay a too great stress on its existing position and means of access as they may be entirely altered.⁶⁶

The compensation is to be paid for the land "with all the potentialities of it, with all the actual use of it by the person who holds

60. Roghu Nath v. Coll. of Dacca 11 C. L. J. 612 ; 6 Ind. Cas. 457 ; Rajendra-Nath v. Sec. of State 32 Cal. 343 ; Fink v. Sec. of State 31 Cal. 593 ; Trustees, Bombay Improvement v. Karsandas 33 Bom. 28 ; 10 Bom. L. R. 688 ; 1 Ind. Cas. 451 ; Trustees, Bombay Improvement v. Jalbhoy 33 Bom. 483 ; 11 Bom. L. R. 674.

61. R. v. Brown (1867) L. R. 2 Q. B. 630 ; 36 L. J. Q. B. 322 ; Ripley v. G. N. Rail. Co. (1875) 10 Ch. App. 435 ; 31 L. T. 869 ; Brown v. Com. for Rail. (1890) 15 App. Cas. 240 ; Thompson v. Hammersmith Corporation (1906) 1 Ch. 299.

62. In re Dorabji Cursetji 10 Bom. L. R. 675 : in re Dhanjibhoy Bomanji

10 Bom. L. R. 701.

63. Bwlfa &c. Steam Collieries v. Pontypridd Water Works Co. (1902) 2 K. B. 135, aff. (1903) A. C. 426 ; in re Sorabji 10 Bom. L. R. 696.

64. In re Gough &c. (1904) 1 K. B. 417 ; 73 L. J. K. B. 228 ; in re Lucas &c. (1909) 1 K. B. 16 C. A. ; Bhujabalappa v. Coll. of Dharwar 1 Bom. L. R. 454 ; in re Munji Khetsey 15 Bom. 279 ; Govt. of Bombay v. Karim Tar 33 Bom. 325 ; 3 Ind. Cas. 273 ; 10 Bom. L. R. 660.

65. Wernicke v. Sec. of State 13 C. W. N. 1046 ; 2 Ind. Cas. 562 ; Daya Khushal v. Asst. Coll., Surat 38 Bom. 37.

66. In re Sorabji 10. Bom. L. R. 696

LECTURE III. [—] it⁶⁷ Land in the neighbourhood of a town has always potential value.⁶⁸ Agricultural land may be valued at more than its value as agricultural land, if it had any other fair and reasonable capabilities, not far-fetched hypothetical capabilities but reasonably fair contingencies, *e.g.*, suitability for building or other special purposes.⁶⁹ By S. 557 (c) C. M. Act III (B.C.) of 1899, the market value of the land and building shall be determined according to its actual disposition at the date of the publication of the declaration, and not on its most advantageous dispositions, *e.g.*, bustee land should not be valued on the assumption of its adaptability for use as building land.⁷⁰ The fact that the land would never have been allowed to be built upon, must be taken into consideration in determining the market value; such land cannot be valued as a building site.⁷¹

(g) ^(g) Reinstatement.

When the land is used for some particular purpose, not of a commercial nature, such as for a school, a church or a house of an exceptional character, the income derived, or probably to be derived from the land, would not constitute a fair basis in assessing the value to the owner. The method adopted in such a case is known as "reinstatement," by which the amount of compensation is assessed according to the cost of acquiring an equally convenient site and erecting an equally convenient premises.⁷² So, when a person has a limited interest in the land, the Collector may, with the previous sanction of the Local Government, make any arrangement with him, either by the grant of other lands in exchange, the remission of land revenue on other land held under the same title, or in such other way as may be equitable, having regard to the interests of the parties concerned.⁷³

67. Per Lord Halsbury, L. C., in Com. of Inland Revenue v. G. & S. W. Rail. Co. (1877) 12 App. Cas. 315 at p. 321; Bwllfa &c. Steam Collieries v. Pontypridd Water Works Co. (1902) 2 K. B. 135, aff. (1903) A. C. 426; Government v. Dayal Mulji 9 Bom. L. R. 99; Sec. of State v. Charlesworth, Pilling & Co. (1901) A. C. 373; 28 I. A. 121; 26 Bom. I.; *in re Munji Khetsey* 15 Bom. 279; *in re Sukhranand Guruam-khari* 34 Bom. 186; 11 Bom. L. R. 1176.

68. *In re Dorabji Cursetji* 10 Bom. L. R. 675.

69. R. v. Brown (1867) L. R. 2 Q.B.

630; 36 L. J. Q. B. 322; Ripley v. G. N. Rail. Co. (1875) 10 Ch. App. 435; 31 L. T. 869; Sec. of State v. Gopal Singh 1 Ind. Cas. 210; Coll. of Dacca v. Hari Das 11 Ind. Cas. 163.

70. Harish Chandra v. Sec. of State 11 C. W. N. 875; see C. I. Act V. (B.C.) of 1911, Sch. S. 9.

71. Ujagar Lal v. Sec. of State 8 A. L. J. 796.

72. London School Board v. S. E. Rail. Co. (1887) 3 T. L. R. 710 C. A.

73. S. 31 (3) L. A. Act I of 1894
see also Navayana v. Ram Chandra 13 Mad. 485.

Damage sustained by reason of the taking of any standing crops or trees on the land at the date of the Collector's taking possession, should be taken into consideration in assessing the amount of compensation.⁷⁴

Where several pieces of land are owned by the same person, though not held under the same title, nor contiguous to each other, but so situated that the possession and control of each gives an enhanced value to all of them as one holding, if one piece is compulsorily taken the owner will be entitled to compensation for damage by severance and injurious affection to the others.⁷⁵ In estimating compensation for severance, both the actual and prospective use of the land must be considered.⁷⁶ The true measure of damages where part of an entire tract is taken, is the depreciation in value of the remaining tract, that is, the difference in the value of the whole tract immediately before and immediately after the acquisition.⁷⁷

Where in consequence of the severance the owner is put to increased expenses or to inconvenience, additional compensation must be allowed.⁷⁸ It is no answer to this claim to say that an injury that may be caused in future by the use of the acquired land will be actionable.⁷⁹

If some only of the rights in or over the land are to be acquired, as when an easement appurtenant to the land is destroyed, the land is commonly said to be injuriously affected. Hence, a person cannot claim compensation on the ground that his land has been injuriously affected, unless he claims an interest in, or an easement over, the land acquired. "Where by the construction of works, there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property and which right gives an additional

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ii Compensation for damage to crops.

iii Compensation for severance.

iv Compensation for injurious affection

74. S. 23 (2) L. A. Act I of 1894.

Bail. Co. (1875) 10 Gh. App. 435; 31 L. T. 569.

75. S. 23 (3) (1) L. A. Act I of 1894 : Cowper Essex v. Acton Local Board (1889) 14 App. Cas. 153; 58 L. R. (Q. B.) 594; Holt v. G. and C. Co. (1872) L. R. 7 Q. B. 728.

77. Wernicke v. Sec. of State 13 C.W.N. 1046; 2 Ind. Cas. 562.

76. Buccleuch (Duke) v. Metropolitan Board of Works (1872) L. R. 5 H. L. 418; R. v. Brown (1867) L. R. 2 Q. B. 630; 36 L. J. Q. B. 322; Ripley v. G. N.

78 Barooira Tea Co. v. Sec. of State 28 Cal. 685; Sarat Chandra v. Sec. of State 10 C.W.N. 250; Taylor v. Coll. of Purnea 11 Cal. 423; Madhu Sudan v. Coll. of Cuttack 6 C.W.N. 406.

79. Wernicke v. Sec. of State 13 C.W.N. 1046; 2 Ind. Cas. 562.

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market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by such interference the property as a property is lessened in value.⁸⁰ Thus, where the lands on both banks of a river which were used as landing places for a ferry were acquired for the construction of a railway bridge which injuriously affected the working of the ferry owned by the land owner, a claim could be made for such damage.⁸¹ If however none of the claimant's land is taken, no compensation is given for personal damage or loss or the authorized user of the works.⁸²

Where part of the claimant's land is taken, he is entitled to compensation, not only for the construction of works but also for the future use to which the land taken from him is to be put which may cause damage to the remainder of his lands.⁸³ But if the injurious affection is not due to the part of the works constructed on the land taken from an owner but to that constructed on other lands, he is not entitled to compensation for such injurious affection.⁸⁴ For anything done in excess of the powers or contrary to the provisions of the Act, the proper remedy is in the ordinary tribunal.⁸⁵

The amount of compensation is commonly determined by the ordinary rules applicable to damages in actions of torts.⁸⁶ An owner

80. Per Lord Cairns, in Metropolitan Board of Works v. McCarthy (1874) L. R. 7 H. L. 243 cited in Madhu Sudan v. Coll. of Cuttack 6 C.W.N. 406.

81. Rameswar v. Sec. of State 34 Cal. 470; 11 C.W.N. 356; 5 C. L. J. 669; Coll. of Dinajpur v. Girjanath 25 Cal. 346.

82. S. 24 (4) L. A. Act I of 1894; Hammersmith etc. Rail. Co. v. Brand (1869) L. R. 4 H. L. 171; Ricket v. M. Rail. Co. (1867) L. R. 2 H. L. 175; 36 L. J. Q. B. 205; C. Rail. Co. v. Walker's Trustees (1882) 7 App. Cas. 259.

83. C. Rail. Co. v. Walker's Trustees (1882) 7 App. Cas. 259; Wernicke v. Sec. of State; 13 C.W.N. 1016; 2 Ind. Cas. 562; Cowper Essex v. Acton Local Board (1889) 14 App. Cas. 153; 58 L. J. Q. B. 594; in re Stockport etc. (1861) 33 L. J. Q. B. 251; Buccleuch (Duke) v. Metropolitan Board of Works (1872) L. R. 5 H. L. 418.

84. Cowper Essex v. Acton Local Board (1889) 14 App. Cas. 153; 58 L. J. Q. B. 594; Horton v. Colwyn Bay etc. (1908)

1 K. B. 327 C. A.; R. v. Mountford (1906)

2 K. B. 814. Read with S. 10 I. R. Act IX of 1890, S. 10 L. A. (Mines) Act XVIII of 1885 and S. 16 I. T. Act. XIII of 1885, it seems that compensation is to be awarded for injury done to land by the construction or execution of the works, even though no part of the lands of the persons injured is taken.

85. Caledonian Rail. v. Colt (1860)

3 Macq. 833; L. B. & S. C. Rail. Co. v. Truman (1885) 11 App. Cas. 45

55 L. J. Ch. 354; Lawrence v. G. N. Rail. Co. (1851) 16 Q. B. 643; 20 L. J. Q. B. 293; Southwark &c. Water Co. v. Wandsworth Dist. Board (1898) 2 Ch. 603; 67 L. J. Ch. 657; Roberts v. Charing Cross etc. Rail. Co. (1903) 87 L. T. 732; G.ekwar v. Gandhi 30 I. A. 60; 27 Bom. 311; 7 C.W.N. 393.

86. In re London etc. Rail. Co. (1889)

24 Q. P. D. 326; Ricket v. M. Rail. Co. (1867) L. R. 2 H. L. 175; 36 L. J. Q. B. 205.

is not injuriously affected, unless the damage is such that but for the statutory authority, it would have been actionable, nor, where the damage complained of is a personal injury or an injury to trade or caused by the user and not by the construction of the authorised works.⁸⁷ Hence, any damage sustained by the person interested in the land acquired which if caused by a private person, would not render such person liable to a suit, should not be taken into consideration.⁸⁸ Thus, things which one may do on his own land with impunity, though they seriously affect the comfort, convenience and even pecuniary value which attach to the land of his neighbours, should not become the subject of compensation when done by the third person who for the public benefit have been compulsorily substituted for the original owner.⁸⁹ A claim for compensation for "injurious affection" is not a claim for damages for a wrongful act but for an act which is done in the lawful exercise of statutory powers and as such is capable of assignment.⁹⁰

It is a recognised principle to exclude from the assessment of compensation any enhancement or diminution in value of the land required, or of other land of the person interested, consequent on the construction of the works authorised by the statute under which the assessment is made.⁹¹ Hence, any enhanced value consequent on the construction of the authorised works cannot be set off against the damage caused by severance or injurious affection.⁹² But under S. 49 B. I. Act IV (B. C.) of 1888, the Court shall take into consideration any increase in the value of any other land or building belonging to the person interested by the acquisition.

The compulsory change of residence or place of business may often result in inconvenience or serious loss to the persons concerned. Locality often possesses an element of convenience which has an important value in connection with business. If a person enjoys such special advantage through having established himself in a particular site, he should be entitled to compensation, when he is disturbed for the benefit of the general public.⁹³ Trade or custom

Betterment.

v. Compensation for change of residence or place of business;

87. Ricket v. M. Rail. Co. (1867) L. R. 2 H. L. 175; 36 L. J. Q. B. 295.

88. S. 24 (3) L. A. Act I of 1894.

89. Per Lord Penzance, in Metropolitan Board of Works v. McCarthy (1874) L. R. 7 H. L. 243.

90. Dawson v. G. N. & C. Rail. Co. (1905) 1 K. B. 260.

91. S. 24 (5 & 6) L. A. Act I of 1894; Penny v. Penny (1867) L. R. 5 Eq. 227; 37 L. J. Ch. 340.

92. Senior v. M. Rail. Co. (1863) 32 L. J. Ex. 225; Eagle v. C. C. Rail. Co. (1867) L. R. 2 C. P. 638.

93. S. 23 L. A. Act I of 1894.

LECTURE III. is a thing appertaining to the premises and not to the person of the occupier : but all things appertaining to the premises are part of the premises. Hence, loss of profit by loss of business is a loss to the good will of the premises and the good will is a part of the value of the property.⁹⁴

The loss of earnings is calculated on the basis of what would be the earnings, if the trade or occupation were pursued at the particular locality, having regard to the earnings that may accrue from the new place.⁹⁵ The fact that the business is carried on at a loss does not disentitle the owner from claiming for trade loss, on the ground that if he had not been expropriated, he would have an opportunity of making his business profitable.⁹⁶ In ascertaining the value to the owner in respect of the use of the land by him, loss of business and of good will in so far as it enhances that value to him may be regarded.⁹⁷ But if the loss is not the direct consequence of the taking no compensation should be awarded in respect of it.⁹⁸

For incidental expenses.

The reasonable expenses incidental to the change of residence or place of business should also be taken into account, since these are losses consequent on the taking of property under statutory powers. The compensation for expulsion is determined on the same principle as damages in an action for trespass,⁹⁹ and it follows that the ordinary principle of remoteness of damage applies and if the loss is not the direct consequence of the taking, no compensation should be awarded in respect of it.¹⁰⁰ Such damages include the value of the fixtures which are attached to the land, the cost of the removal by the owner of his furniture and goods and the consequent depreciation in the value of furniture which has been specially fitted but not attached to the land : they also include any diminution in the value of the stock, if he be a trader, consequent on his removal, or in the alternative, on a forced sale and also increased

94. Ricket v. M. Rail. Co. (1867) L.R. 2 H. L. 175 ; 36 L. J. Q. B. 205.

95. Venkatachariar v. Divisional Officer, Tirunelvelly (1912) M. W. N. 460.

96. Ricket v. M. Rail. Co. (1867) L.R. 2 H. L. 175 ; 36 L. J. Q. B. 205.

97. White v. H. M. Com. of Works (1870) 22 L. T. 591 ; Cooper v. Metropolitan Board of Works (1883) 25 Ch.

D. 172 C. A.

98. R. v. Vaughan (1868) L. R. 4 Q. B. 190.

99. Ricket v. M. Rail. Co. (1867) L.R. 2 H. L. 175 ; 36 L. J. Q. B. 205.

100. R. v. Vaughan (1868) L. R. 4 Q. B. 190 ; in re Clarke & Wandsworth Board (1868) 17 L. T. 549 ; S. 557 (2) C. M. Act III B. C. of 1899.

rental or other reasonable expenses in taking equally convenient new premises for the purpose of carrying on his business.¹⁰¹

The damage (if any) *bona fide* resulting from diminution of the profits of the land between the date of declaration and that of the Collector's taking possession should be compensated, for the loss to an owner includes not only the actual value of the land but all damages directly consequent on the taking thereof under statutory powers.¹⁰² An impending acquisition might be the cause of premises remaining untenanted, as considerable time might elapse between the publication of the declaration and the taking possession of the land.

In addition to the market value, a sum of 15 p.c. on the market value shall be paid in consequence of the compulsory nature of the acquisition.¹⁰³ But in the case of land acquired under B. I. Act IV (Bo. C.) of 1898 and C. I. Act V (B. C.) of 1911, 15 p. c. is not allowed, as the operation of S. 23 (2) of the L. A. Act I of 1894 is excluded by these Acts.

Where the owners of a coal mine are prevented from working the mine, the true enquiry is not what is the value of the coal at the date of the declaration but what would the owners, if they were not prohibited, have made out of the coal during the time it would have taken them to get it.¹⁰⁴ "The full value of the coal and nothing less than the full value of the coal, deducting of course the cost of getting it, must be the measure of the compensation which would be due to the lessee."¹⁰⁵ If the mines are allowed to work subject to more than the customary restrictions on the working by the owner, lessee or occupier, he is entitled to compensation for the diminution of his interest therein.¹⁰⁶ Compensation should also be allowed for expenses and losses which, though not actually incurred, are yet imminent and capable of immediate ascertainment; but it cannot be claimed or recovered for merely apprehended or prospective damage.¹⁰⁷ The compensation has to be settled once for

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vi. Compensation for diminution of profit.

vii. Compensation for compulsory acquisition.

Compensation for preventing the working of mines.

101. Mr. (now Sir) Alfred Cripp's Law of Compensation 5th Edn. p.p. 106-107.

Eden v. N. W. Rail. Co. (1907) A. C. 400.

102. S. 23 (6) L. A. Act I of 1894.

106. L. & N. W. Rail. Co. v. Evans

103. S. 24 (2) L. A. Act I of 1894.

(1893) 1 Ch. 16; 62 L. J. Ch. 1; Clipperton's

104. S. 5 L. A. (mines) Act XVIII

Oil Co. v. Edinburgh Water Trustees

of 1885; Bwllfa &c. Steam Collieries v.

(1904) A. C. 64; 73 L. J. P. C. 32.

Pontypridd Waterworks Co. (1902) 2 K.

107. Whitehouse v. W. Rail. Co. (1869)

B. 135, aff. (1903) A. C. 426.

L. R. 5 Ex. 6; Holliday v. Mayor &c. of

105. Per Lord Penzance, in Smith v.

Wakefield (1891) A. C. 81; 60 L. J. Q. B.

G. W. Rail. Co. (1877) 3 App. Cas. 165:

361; in re Lord Gerard &c. (1895)

1 Q. B. 452.

LECTURE (II). all, that is, for damages actually sustained and also for what can be reasonably anticipated ; but whether such damages could reasonably have been foreseen at the time of acquisition is a question of fact to be determined by the Court.¹⁰⁸ Possible uncertain expenses and losses may be taken into consideration as they actually occur from time to time.¹⁰⁹ If any loss or damage is sustained by the owner of the land lying over the mines, the working of which has been prevented or restricted and who is not the owner of the mines, the local Government shall pay full compensation to him for the loss or damage so sustained.¹¹⁰

Persons entitled to compensation. i. owner.

"It is the person who is entitled to the land who ought to get the money."¹¹¹ Hence, all persons who are deprived of any interest in the land to be taken, are entitled to claim compensation for such loss as they may sustain.¹¹² *Prima facie*, the owner, or the person in possession of the land in the assumed characters of the owner and exercising the ordinary rights of ownership, is the person interested in the land. Any other person claiming interest in the land is bound to prove the title he pleads.¹¹³ Where the land was used as a burning ghat or a public road, the user of, but not the ownership in, which vested in the Municipality, the owner was entitled to the compensation for the land.¹¹⁴

A person shall be deemed to be interested in the land if he is interested in an easement affecting the land.¹¹⁵ A person, who has acquired a prescriptive right over the land, is entitled to come in as a person interested and claim compensation for the taking away

108. Mercer v. Liverpool &c. Rail. Co. (1903) 1 K. B. 652 C. A. aff. (1904) A. C. 461; Croft v. N. & W. Rail. Co. (1863) 32 L. J. Q. B. 113; Indo-Burma Petroleum v. Coll. of Yenangyagung 32 Ind. Cas. 202; Rameswar v. Sec. of State 34 Cal. 470; 11 C. W. N. 356; 5 C. L. J. 669.

109. S. 9 L. A. (Mines) Act XVIII of 1885; see also Whitehouse v. W. Rail. Co. (1869) L. R. 5 Ex. 6; Holliday v. Mayor &c. of Wakefield 1891 A. C. 81; 60 L. J. Q. B. 361.

110. S. 10 L. A. (Mines) Act XVIII of 1885.

111. Per Cotton, L. J., in re Lowestoft Manor (1883) L. R. 21 Ch. D. 253; see

Mahatab Chand v. Bengal Coal Co. 10 W. R. 391.

112. S. 3 (b) L. A. Act I of 1894.

113. Issur Chunder v. Sutty Dyal 12 W. R. 270; Chundee Churn v. Bidoo Bucan 10 W. R. 48; Perry v. Clissold (1907) A. C. 73.

114. Chairman, Howrah Municipality v. Khetra Krishna 33 Cal. 1290; 10 C. W. N. 1044; 1 C. L. J. 343; see also S. 30 B. M. Act III (B. C.) of 1884; Chairman, Naihati Municipality v. Kishori Lall 13 Cal. 171; Modhu Sudan v. Promoda Nath 26 Cal. 732.

115. S. 3 (b) L. A. Act I of 1894.

or extinguishment of his incorporeal rights, when the servient land is acquired.¹¹⁶

Persons interested include not merely the legal or beneficial owners or persons having absolute power of sale, but also persons having equitable interests, such as mortgagees, rent chargers or other persons who have a security over the land.¹¹⁷

As the date of publication of the notification fixes the time when the interest of the various parties are to be determined for the purpose of compensation¹¹⁸, a person who enters into contract with the owner of the land, previous to the declaration and whose purchase is completed subsequent to the award and reference by the Collector, is a person interested in the land and in the compensation money.¹¹⁹

The general principle of compensation is that the loss or injury must be suffered by persons having legal right or interest in the land, and they are entitled to compensation only when there is a physical interference with their rights.¹²⁰ Hence, persons who have merely licenses to use the land or premises, have no valid claim.¹²¹ So, workmen employed in a quarry on the land acquired, although they earned money on the plot, are not persons interested therein.¹²² So, also, a right to supply refreshments in a theatre and for that purpose to use certain parts of it is not an interest in land.¹²³

Mere personal rights, not attached to the land, confer no right to compensation. Thus, the tenants, whose tenancies have been determined, either by notice or by the expiration of their term, have no right to compensation, though they may have reasonable

Licensees.

Personal
rights.

116. L. T. & S. Rail. Co. v. Trustees, Gower's Walk Society (1889) 24 Q. B. D. 326 ; Eagle v. C. C. Rail. Co. (1867) L. R. 2 C. P. 638 ; Wigram v. Fryer (1887) 36 Ch. D. 87 ; 56 L. J. Ch. 1098 ; Deo Surun v. Mahomed Ismail 24 W. R. 300 ; Coll. of 24 Perganahs v. Nobin 3 W. R. 27 ; in re Fenwick 14 W. R. Cr. 72 ; 6 B. L. R. App. 47 ; Taylor v. Coll. of Purnea 14 Cal. 423.

117. Martin v. L. C. & D. Rail. Co. (1866) 1 Ch. 501 ; Cooper v. Metropolitan Board of works (1883) 25 Ch. D. 472 C. A.

118. Penny v. Penny (1867) L. R. 5 Eq. 227 ; 37 L. J. Ch. 340 ; Wilkins v. Mayor of Birmingham (1883) 25 Ch. D. 78 ; 53 L. J. Ch. 93 ; B. H. Rail. Co. v.

North (1894) 2 Q. B. 579.

119. Galstaun v. Sec. of State 10 C. W. N. 195.

120. Metropolitan Board of Works v. McCarthy (1874) L. R. 7 H. L. 243 ; C. Rail. Co. v. Walker's Trustees (1882) 7 App. Cas. 259.

121. Municipal Freehold Land v. M. D. Rail. Co. (1883) 1 Cab. & El. 184 ; Bird v. G. E. Rail. Co. (1865) 34 L. J. C. P. 366 ; Frank Warr v. London County Council (1904) 1 K. B. 713 C. A.

122. Sec. of State Shanmugaraya 20 I. A. 80 ; 16 Mad. 369.

123. Frank Warr v. London County Council (1904) 1 K. B. 713 C. A.

LECTURE III.

expectations of having their leases renewed and have expended money on the faith of such expectancy.¹²⁴ A person having an equitable right to a lease is,¹²⁵ but a person having a right of pre-emption is not,¹²⁶ entitled to claim compensation.

On a breach of contract of sale of land, the vendor is entitled to the difference between the contract price and the market price on the day of breach. But he is not entitled to the statutory allowance if the land is acquired after the breach.¹²⁷

The market value of an interest, if ascertainable, may afford some guide towards ascertaining the amount to be apportioned in respect of that interest to the total sum awarded as compensation.¹²⁸ Thus, where there are different interests, the proper method is to calculate the respective values of the interests and to award the compensation in proportion thereto.¹²⁹ As between the landlord and the different grades of tenants, he who can permanently employ the land to the utmost utility is entitled to the largest amount.¹³⁰

For the purpose of determining what amount of compensation is payable to the tenant, the tenant's interest must be regarded at the time of giving notice.¹³¹ No claim can be made if the tenant has received legal notice to quit and his land is not acquired until after such notice has expired.¹³² Nor, when under the terms of his lease, a lessee voluntarily gives a notice to terminate his lease.¹³³

Compensation payable to a lessee as the value of his term or tenancy depends on the difference between the actual rent paid by him and the improved annual rental that the property is worth.

124. R. v. L. & M. Rail. Co. (1836) 4 Ad. & El. 650; Syers v. Metropolitan Board of Works (1877) 36 L. T. 277; R. v. Poulter (1887) 20 Q. B. D. 132 C.A.; 57 L. J. Q. B. 138; *ex parte* Nadin (1848) 17 L. J. Ch. 421.

125. Sweetman v. M. Rail. Co. (1864) 1 Henn. & M. 543; 12 W. N. 304.

126. Clout v. M. & D. Rails. Joint Committee (1883) 48 L. T. 257.

127. Nabin Chundra v. Krishna Baroni 38 Cal. 458; 15 C. W. N. 420; 9 Ind. Cas. 525.

128. In re Pestonji Jehangir 37 Bom. 76; 11 Bom. L. R. 507.

129. Dinendra v. Tituram 30 Cal. 501; 7 C. W. N. 810; Khetter Kristo v.

Dinendra 3 C. W. N. 202; Hirday Narain v. M. J. Powel 35 All. 9; 13 Ind. Cas. 420; 10 A. L. J. 403.

130. Godadhar v. Dhunput 7 Cal. 585; 9 C. L. R. 227.

131. Tyson v. Mayor of London (1871) L. R. 7 C. P. 18; 41 L. J. C. P. 6; Cranwell v. Mayor of London (1870) L. R. 5 Ex. 284; 39 L. J. Ex. 193; Wilkins v. Mayor of Birmingham (1883) 25 Ch. D. 78; 53 L.J. Ch. 93,

132. *Ex parte* Merrett (1860) 2 L. T. (N.S.) 471; R. v. Vaughan (1868) L. R. 4 Q. B. 190; 38 L. J. M. C. 49.

133. R. v. Poulter (1887) 20 Q. B. D. 132; 57 L. J. Q. B. 138.

(2) Tenant.

This difference must be multiplied by the number of year's purchase at which the tenant's interest should be valued, which will be determined by the character of the property and the length of the term of tenancy.¹³⁴ The Government as landlord is not entitled to any thing more than an ordinary landlord.¹³⁵ Where lands are held subject to special covenants, such covenants so far as they affect the value of the owner's interest in such lands must be considered in assessing the amount of compensation payable to him. Such covenants might be equally beneficial or equally disadvantageous to both covenantor and covenantee.¹³⁶

A permanent tenure means a tenure which is heritable and which is not held for a limited period.¹³⁷ Tenures become permanent (1) by express provision of law, as in the case of Putni and similar Taluks (2) by contract and (3) by custom or course of dealing therewith. The onus is upon the tenant to prove that his tenure is of a permanent character.¹³⁸

The use of the words, "Putni Taluk,"¹³⁹ "Taluk,"¹⁴⁰ "from generation to generation,"¹⁴¹ "Estimrari,"¹⁴² "Mokarari,"¹⁴³ *prima facie* imports a hereditary tenure. But the mere use of the words, "Mokarari istimrari," in a pattah granting land does not *per se* denote that the estate is one of inheritance.¹⁴⁴ The Court

Permanent tenure.

134. Mr. (now Sir) Alfred Cripp's Law of Compensation 5th Edn. p 109; Khetter Kristo v. Dinendra 3 C. W. N. 202; Dinendra v. Tituram 30 Cal. 801; 7 C. W. N. 810; Man Mohan v. Coll. of Chittagong 40 Cal. 64.

135. Man Mohan v. Coll. of Chittagong 40 Cal. 64; Jagat Chandra v. Coll. of Chittagong 17 C.W.N. 1001; 17 C. L. J. 61.

136. Penny v. Penny (1867) L. R. 5 Eq. 227; 37 L. J. Ch. 340; in re Brandon (1864) 34 L. J. Ch. 333; in re Chandler's Wiltshire Brewery (1903) 1 K. B. 569; 72 L. J. K. B. 250; in re Morgan and L. & N. W. Rail. Co. (1896) 2 Q. B. 469; 66 L. J. Q. B. 30; Long Eaton &c. Co. v. M. Rail. (1902) 2 K. B. 574; 71 L. J. K. B. 837.

137. See S. 3(8) B. T. Act VIII of 1885.

138. Khetter Kristo v. Dinendra 3 C. W. N. 202; Nilmani v. Mathura Nath 5 C. L. J. 413; ProsummoCoomar v. Sec. of

State 26 Cal. 792; 3 C. W. N. 695.

139. Tarini Charan v. Watson & Co. 3 B. L. R. A. C. 437; 12 W. R. 413; Brindabun v. Brindabun 1 I. A. 178; 21 W. R. 324; 13 B. L. R. 408.

140. Krishna Chandra v. Sudur Ali 22 W. R. 326; Budayar Rahman v. Karam Ali 18 C. L. J. 271.

141. Himut v. Sooneet Koer 15 W. R. 549.

142. Karu nakar v. Niladhro 5 B. L. R. 652; 14 W.R. 107; Munrunjun v. Lehanund 3 W. R. 84; Lakhu Cowar v. Hari Krishna 3 B. L. R. A. C. 226; 12 W. R. 3.

143. Bilashmoni v. Sheepershad 9 I. A. 33; 8 Cal. 664; 11 C. L. R. 215.

144. Lilanund v. Munorunjun I.A. Sup. 181; 13 B. L. R. 124; Tulsi Pershad v. Ramnarain 12 I. A. 205; 12 Cal. 117; Beni Pershad v. Dudd Nath 26 I.A. 216; 27 Cal. 156; 4 C. W. N. 274; Bilashmoni v. Sheo Pershad 9 I. A. 338; 8 Cal. 664; 11 C. L. R. 215.

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must consider the other terms of the instrument under which it was granted, the circumstances under which it was made, the intention of the parties and their conduct since its execution.¹⁴⁵ The absence of words importing the hereditary or permanent character of a tenure may be supplied by the evidence of long and uninterrupted enjoyment and descent from father to son at a fixed and invariable rent, or frequent transfer without any change in the terms of the holding, or in the amount of rent paid, or where land is let for building purposes even if the tenant builds temporary structures.¹⁴⁶ But, where the origin of a tenancy is known, mere long possession or payment of the same rent for several years will not raise a presumption of permanency.¹⁴⁷ Want of registration of the purchaser's name in the landlord's shershtta does not throw any doubt upon the validity of his title.¹⁴⁸ The transfer in favour of a purchaser at a sale in execution of a decree, other than a decree for arrears of rent of a permanent tenant

145. *Sheo Pershad v. Kally Das* 5 Cal. 543; 5 C.L.R. 133; *Narsingh Dyal v. Ram Narain* 30 Cal. 883; *Agiu Bindh v. Mohan Bikram* 30 Cal. 20; 7 C. W. N. 314; *Watson & Co. v. Mohesh Narain* 24 W.R. 176.

146. *Ismail Khan v. Aghore Nath* 7 C.W.N. 731; *Ismail Khan v. Nani Gopal* 8 C. L. J. 513; *Watson & Co. v. Rudha Nath* 1 C.L.J. 572; *Nittyanund v. Banshi Chandra* 3 C.W.N. 341; *Ananda v. Kunjo* 8 C.L.J. 177; *Upendra Krishna v. Ismail Khan* 31 I. A. 144; 32 Cal. 41; 8 C. W. N. 899; *Nilratau v. Ismail Khan* 31 I.A. 149; 32 Cal. 51; 8 C. W. N. 895; *Dinendra v. Tituram* 30 Cal. 801; 7 C. W. N. 810; *Ismail Khan v. Jaigun Bibi* 27 Cal. 570; 4 C. W. N. 210; *Grant v. Robinson* 11 C. W. N. 242; 5 C. L.J. 178; *Nanda Lal v. Attarmoni* 35 Cal. 763; 12 C.W.N. 432; *Megh Lal v. Raj Kumar* 31 C.L. 358; 11 C.W.N. 527; *Bepin Behari v. Bhagwat Sahai* 9 C. W. N. 699; *Bagdu Majai v. Durga Prosad* 9 C. W. N. 292; *Naba Kumari v. Behari Lal* 34 I. A. 160; 34 Cal. 992; 11 C. W. N. 865;

6 C. L. J. 122; *Ram Ranjan v. Ram Narain* 22 I. A. 60; 22 Cal. 533; *Gopal Lall v. Tilluck Chunder* 10 Moo. 191; 3 W. R. P. C. 1 *Braja Nath v. Lakhi Narayan* 7 B. L. R. 211; *Nidhi Krishna v. Nistarini* 13 B. L. R. 416; 21 W. R. 386; *Nemai Chandra v. Mahomed Basir* 9 C. L. J. 475; *Caspersz v. Kedar Nath* 28 Cal. 738; 5 C. W. N. 858; *Dhunput Singh v. Goonan Singh* 11 Moo. 433; 9 W. R. P. C. 3; *Sattyasaran v. Mohesh Chandra* 12 Moo. 263; 2 B. L. R. P. C. 23; 11 W. R. P. C. 10; *Kooldeep Narain v. Government* 14 Moo. 247; 11 B. L. R. 71; *Runo Lall v. Wilson* 26 Cal. 209; 2 C. W. N. 718; *Dunne v. Nobo Krishna* 17 Cal. 144.

147. *Ismail Khan v. Asmatulla* 8 C. W. N. 297; *Ismail Khan v. Mrinmoyi* 8 C. W. N. 301; *Winter-scale v. Sarat Chundia* 8 C. W. N. 155.

148. *Nikalri v. Bichitranaanda* 12 C. L. J. 158.

of a tenure or holding, is completed upon payment of the fee, irrespective of its acceptance by the landlord.¹⁴⁹

LECTURE III.

Where raiyats prove that they have been holding at a uniform rent for 27, 57, or 60 years, it can be presumed that they are occupancy raiyats, holding at rent fixed in perpetuity.¹⁵⁰ But a Court is not bound as a matter of law to presume that the tenure is a permanent one, merely from the fact of long possession of the land.¹⁵¹

The forfeiture clause in a mokarari lease that the lease will be cancelled for a default in payment of rent does not affect its permanent character.¹⁵² A tenant may acquire by prescription a permanent right adversely to the Zemindar.¹⁵³ When the question of the permanency or otherwise of a tenure arises between the landlord and the tenant, S. 50 of B. T. Act VIII of 1885, though not applicable, is an useful guide to the court in deciding the question.¹⁵⁴

Where the tenancy is permanent, the landlord is not entitled to more than the capitalised value of his rent, that is, the net profit after deducting the Government revenue.¹⁵⁵ The landlord may also get compensation for the chance of the enhancement of the rent and of the lease coming to an end on being forfeited; but to assess this chance is extremely difficult and the onus is on the landlord to make it out.¹⁵⁶ The tenant is entitled to abatement of rent in proportion to the quantity of land taken.¹⁵⁷ But where he has

149. Giris Chandra v. Khagendra Nath 16 C. W. N. 64; 13 C. L. J. 613; Kristo Bullay v. Kristo Lal 16 Cal. 642; Chintamoni v. Rash Behary 19 Cal. 17; Mohesh v. Saroda 21 Cal. 433.

150. Guhab Misser v. Kalanand Singh 12 C. L. J. 107.

151. Nobin Chunder v. Modun Mohun 7 Cal. 677; 9 C. L. R. 233; Sheo Dyal v. Mohabeer Pershad 10 W. R. 477; 2 B. L. R. App. 8; See. of State v. Luchmeswar 16 I. A. 6; 16 Cal. 223.

152. Megh Lal v. Raj Kumar 31 Cal. 358; 11 C. W. N. 527; 5 C. L. J. 208.

153. Bagdu Majhi v. Durga Prosad 9 C. W. N. 292.

154. Nanda Lal v. Atarnoni 35 Cal. 763; 12 C. W. N. 432; Dinendra v. Tituram 30 Cal. 801; 7 C. W. N. 810.

801; 7 C. W. N. 810; Ganpat Singh v. Motichand 18 C. W. N. 103; 16 C. L. J. 301; Jagat Chandra v. Coll. of Chittagong 17 C. W. N. 1001; 17 C. L. J. 61; Jogesh Chandra v. Sec. of State 18 C. W. N. 531; Chooramoni v. Howrah Mills Co. 11 Cal. 696.

155. Shama Prosumo v. Brakoda Sundari 28 Cal. 146; Preonath v. Bhupan Mohini 10 C. W. N. 76n; Bhupati v. Sec. of State 5 C. L. J. 662; Biprodas v. Sarat 16 C. L. J. 209; Bhabani Nath v. L. A. Dy. Coll. 7 C. W. N. 130; Dinendra v. Tituram 30 Cal. 801; 7 C. W. N. 810; Raye Kissory v. Nilcant 20 W. R. 370.

156. Bhabani Nath v. L.A. Dy. Coll. 7 C. W. N. 130; Mahtab Chand v. Chittro Coomaree 16 W. R. 291; Uma Sunkar v. Tarini Chunder 9 Cal. 571; 11 C. L. R. 366.

157. Dinendra v. Tituram 30 Cal.

LECTURE III. taken the whole amount of the compensation money, he is to pay the full fixed rent notwithstanding the acquisition.¹⁵⁸ A covenant in a lease, that upon acquisition, the whole compensation money should belong to the landlord, is not illegal or contrary to public policy under S. 25 I. C. Act IX of 1872, even where the tenancy is permanent.¹⁵⁹ The division of the compensation money equally between the Zemindar and the Putindar was disapproved.¹⁶⁰ Where rent is not fixed, the landlord is entitled to a capitalisation of as much rent as is payable for the land together with something more in respect of the possibility of the value of the land hereafter.¹⁶¹ The liability of a tenant to ejectment and enhancement is to be considered in apportioning the compensation money.¹⁶²

A lessee of mines, whose term is of sufficient length to enable him by working with reasonable diligence to exhaust them, may be taken to be the absolute owner thereof, and the compensation money having been paid to him, neither the reversioner nor any person claiming under him is entitled to any compensation, other than the loss of royalty by reason of the non-working of the mines.¹⁶³ The power reserved by a lease to the lessee of removing his improvements at the termination of the lease being taken away by *cis major* of the proceeding under the L. A. Act I of 1894, the compensation, to which the lessee is entitled, is the yearly profit which he makes upon the land multiplied by the number of years which the lease has to run.¹⁶⁴

Limited interests.

Where land was let at a rent below its value but with a proviso that in the event of any part of it being taken compulsorily, the lessor could re-enter, he ought to be compensated on the basis of the full value and not on that of the rent actually paid.¹⁶⁵ In assessing

158. Ram Ranjan v. Banwari Lal 16 C. L. J. 211; Biprodas v. Sarat 16 C. L. J. 209; Ganpat Singh v. Motichand 18 C. W. N. 103; 16 C. L. J. 301; Satis Chunder v. Jalindra Nath 7 C. L. J. 281; Peeri Mohan v. Aftab Chand 10 C. L. R. 526.

159. Godadhar v. Lalit Kumar 10 C. L. J. 476.

160. Godadhar v. Dhunpat 7 Cal. 585; 9 C. L. R. 227; Khetter Kristo v. Dinendra 3 C. W. N. 202; Shama Prosunno v. Brakoda Sundari 28 Cal. 146.

161. Jagat Chandra v. Coll. of Chittagong 17 C. W. N. 1001; 17 C. L. J. 61.

162. R. Mitter v. Anukul Chunder 9 C. W. N. 232n; Ambika Nath v. Aditya Nath 6 C. W. N. 621; Bir Chunder v. Nobin Chunder 2 C. W. N. 453.

163. G. W. Rail. Co. v. Smith (1876) 45 L. J. Ch. 235.

164. Jogendra v. Rajendra 13 C. L. J. 262; 9 Ind. Cas. 923.

165. In re Morgan and L. & N. W. Rail. Co. (1896) 2 Q. B. 469; 66 L. J. Q. B. 36.

the lessee's interest he will be entitled to compensation in respect of any right he may have to a renewal of the lease.¹⁶⁶ The fact that the raiyat has a home and a sphere of labour for himself and his family should be taken into consideration.¹⁶⁷

As between the landlord and an occupancy raiyat, compensation should be apportioned with regard to the values of their respective interests and if possible something should be awarded to the landlord on account of the possibility of the rent being enhanced.¹⁶⁸ An under-raiyat is not entitled to any portion of the compensation money.¹⁶⁹ But where he had planted trees he was given half.¹⁷⁰ A yearly tenant of agricultural land or of tank and a tenant for periods over a year are entitled to compensation for the value of their unexpired term or interest and for every kind of loss or damage they may suffer.¹⁷¹

Land with buildings upon it should be valued as one property and the amount apportioned between the owner of the land and the owner of the buildings.¹⁷²

Acquisition of the mortgaged premises is not a destruction of the security : its effect is to transfer the lien to the compensation money.¹⁷³ But where the mortgage was effected after the declaration, there is no lien on the mortgaged property to be transferred.¹⁷⁴ Where the dispute was between a Hindu widow and her adopted son the Privy Council divided the compensation money into halves.¹⁷⁵

166. *Bogg v. M. Rail. Co.* (1867) L. R. 4 Eq. 310; *Holt v. Gas Light & Coke Co.* (1872) L. R. 7 Q. B. 728.

167. *Appasami v. Rangappa* 4 Mad. 367; *Banumadevara v. Sabbarayudu* 36 Mad. 395; 10 M. L. T. 349; 2 M. W. N. 401. For Compensation payable to Ulkudi Subhavasis and Mirasidars of Madras see *Appasami v. Rangappa* 4 Mad. 367; *Sivantha v. Natu Ranga* 26 Mad. 371.

168. *Godadhur v. Dhunpat* 7 Cal. 585; 9 C. L. R. 227; *Hardey Narain v. Mrs. Powell* 35 All. 9; 13 Ind. Cas. 420; 10 A. L. J. 403; Coll. of Dacca v. Hari Das 14 Ind. Cas. 163.

169. *Saikh Hasrat v. Jagat Narain* 11 C. W. N. 312n.

170. *Hara Gopal v. Abu Bakkar* 3

C. L. J. 36n.

171. *Narain Chandra v. Sec. of State* 28 Cal. 152; 5 C. W. N. 349; *R. v. G. N. Rail. Co.* (1876) 2 Q. B. 151; *Coll. of Poona v. Kashinath* 10 Bom. 585.

172. *Dunia Lal v. Gopî Nath* 22 Cal. 820; *Govt. of Bombay v. Esufali* 34 Bom. 618; 5 Ind. Cas. 621; 12 Bom. L.R. 34.

173. *Jotoni Chowdhurani v. Amor Krishna* 13 C. W. N. 350; 6 C. L. J. 745; 1 Ind. Cas. 164; *Atumugam v. Sivagnana* 13 Mad. 321; *Basa Mal v. Tajammul* 16 All. 78; *Venkata Viraragava v. Krishnasami* 6 Mad. 344; *Chomu v. Unma* 14 Mad. 46.

174. *Amar Chandra v. Ram Sundar* 13 C. W. N. 357; 1 Ind. Cas. 45.

175. *Braja Kisora v. Kundana Devi* 26 I.A. 60; 22 Mad. 431; 3 C.W.N. 378.

LECTURE IV.

Compulsory Sales in execution of decrees for money.

(Preliminaries prior to attachment.)

A final and
subsisting
decree is alone
capable of
execution.

A decree or order is the formal expression of any decision which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in a suit.¹ Execution is the act of carrying into effect the final decision of a Court or other jurisdiction. Execution proceeding is a continuation of the suit in which the decree was passed.² It is a judicial proceeding within S. 476 Cr. P. C. Act V of 1898.³

Final.

Every decree or order for the payment of money may be executed by the attachment and sale of the judgment debtor's property.⁴ It is the final decree or order alone which completely disposes of the matter in controversy or determines the respective rights of the litigant parties that can be executed. But when the final decree is dependent upon, and subordinate to, a preliminary decree which was superseded by appeal, it can not be executed.⁵ A judgment on condition can be enforced by execution only in pursuance of the condition thereof. When the decree or order of the Court of first instance is not appealed against, then the decree or order of the appellate Court, whether it affirms, modifies or reverses the decree or order appealed against, is the only final decree or order capable of being executed.⁶

The decree must in form be sufficient to enable the Court by inspection to determine what has been specifically awarded, from whom the award is to be recovered and to whom it is due. If the

1. S. 2 (2), and (14) C. P. C. Act V of 1908.

2. Biswa Nath v. Bhagwandin 14 C. L. J. 618; Gopi Mohan v. Doybaki Nandan 19 Cal. 13.

3. Abdul Basir v. Panch Kowri 12 C. L. J. 618.

4. Ss. 36, 50, O. 21 r. 30 C. P. C. Act V of 1908.

5. Ram Nath v. Basanto Narayan 18 C. L. J. 209.

6. Kistokinker v. Burrodacaunt 14 Moo. 165; 10 B. L. R. 101; 17 W. R. 292; Luchmun v. Kishun 8 Cal. 218; 10 C. L. R. 425; Mahomed v. Mohini Kanta 34 Cal. 874; Kristnama v. Mangamma 26 Mad. 91; Muhammad Suliman v. Muhammad Yar 11 All. 267.

decrees does not specify the relief granted, it is incapable of execution.⁷

The judgment must not be void. A void judgment is in legal effect no judgment. All proceedings founded on it are void. An execution issued on a void judgment cannot be validated by an amendment of the judgment. An execution regular on its face, based on a judgment equally regular and apparently in full force, must be regarded as a regular execution and though voidable cannot be void. It cannot be the means of ensnaring innocent purchasers when nothing exists to warn them that the foundation on which it apparently rests has in fact been swept away. But when the purchaser has notice, the execution and sale are void.⁸

The decree or order must be subsisting and not set aside.⁹ The reversal of a decree on appeal by some of the defendants on any ground common to all will enure for the benefit of all, and although some of them were not made parties to the appeal, such a decree cannot be executed against any of them.¹⁰ When satisfied the judgment has fully accomplished its mission and all proceedings taken subsequently to the satisfaction are void. A defendant in an execution, issued after the payment of the judgment and before any satisfaction thereof is entered in the record, may either elect to treat any sale of his property made thereunder as void and recover the property sold, or may waive the invalidity of the sale and maintain an action against the plaintiff in execution for the value of such property.¹¹

If a Court is competent to pronounce judgment, it must be equally competent to issue execution to obtain its satisfaction. A Court without the means of executing its judgments and decrees would be an anomaly in jurisprudence not deserving the name of a judicial tribunal. It would be idle to adjudicate what could not be executed and the power to pronounce necessarily implies the power of executing. Whether the decree or order to be executed is passed by a Court of first instance or by a Court of appeal, the proper Court to execute it is the Court of first instance.¹² But the destruction of the tribunal would necessarily carry with it

Competent
executing
courts.

i. Court
passing the
decree.

7. Mohamoyi Prosad v. Abdul Hamid 18 C. W. N. 266.

8. Freeman on Executions §. 19.

9. Pasupati v. Nando Lal 30 Cal. 718; Chettiattil v. Kunhi Koru 29 Mad. 175.

10. O. 41, r. 4 C. P. C. Act V of 1908; see Asibunnessa v. Wali Ahammed 1 C. L. J. 141.

II. Freeman on Executions § 19.

12. S. 37 (a) C. P. C. Act V of 1908.

LECTURE IV. the destruction of its powers. Hence, if the Court of first instance has ceased to exist, the Court that can execute the decree or order is the Court which, if the suit wherein the decree or order was passed, was instituted at the time of making the application for the execution of the decree or order would have jurisdiction to try such suit, but where the Court of first instance has ceased to have jurisdiction to execute it, the decree may be executed, either by the Court of first instance which passed the decree or order, or by the Court which if the suit wherein the decree was passed were instituted at the time of making the application to execute it, would have jurisdiction to try the suit.¹³ A Court does not cease to exist or to have jurisdiction, merely because the local limits of its jurisdiction are altered, or its business is transferred to another Court.¹⁴ The nature of the cause which puts an end to the jurisdiction of the Court is immaterial.¹⁵ The fact that the High Court does not in practice execute its own decrees does not make that Court a Court that has "ceased to have jurisdiction" to execute its decree¹⁶. Where a decree was passed by the Court of an additional Subordinate Judge and subsequently another Subordinate Judge was appointed, execution should be made by the permanent Subordinate Judge.¹⁷

ii. Court to
which decree
is transferred.

Execution issued by one Court to enforce judgment of another Court where there is no authority to do so is an absolute nullity.¹⁸ But the Court which passed a decree may, either on the application of the decree-holder send it for execution to another Court, or of its own motion, send it for execution to any subordinate Court of competent jurisdiction, even if there is property of the judgment-debtor within the jurisdiction of the Court that passed the decree sufficient to satisfy it.¹⁹ Where the Court to which a decree

13. S. 37 (b) C. P. C. Act V. of 1908.

14. Latchman v. Maddan Mohun

6 Cal. 513; 7 C. L. R. 521; Jafar v.

Kamalini 28 Cal. 238; 5 C. W. N. 150;

Paluckdhury v. Radha Purshad 5 Cal. 50;

4 C. L. R. 342; Udit Narain v. Mathura

Pershad 35 Cal. 974; 12 C. W. N. 859;

Kartick Nath v. Tilukdhari 15 Cal. 667;

Shurroop Chunder v. Amerrummissa 8

Cal. 703; Prem Chand v. Mokhoda 17

Cal. 699; Shib Narain v. Gobind Dass

23 W. R. 154 Kalipado v. Dino Nath

25 Cal. 315; Panduranga v. Vytilinga

30 Mad. 537.

15. Gauskha v. Abdul 17 Bom. 162.

16. Hurro Pershad v. Bhupendro

6 Cal. 201; 7 C. L. R. 79.

17. Tara Chand v. Ram Nath 4

C. L. J. 473.

18. Freeman on Executions § 15.

19. S. 39 C. P. C. Act V of 1908;

see Kally Prosonno v. Dinonath 11

B. L. R. 56; 19 W. R. 434.

is to be sent for execution is situate within the same district, as the Court which passed such decree, such Court shall send the same directly to the former Court. But where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the district Court of the district in which the decree is to be executed.²⁰ When a decree is sent to a district Court, it may be executed by itself or transferred for execution to any subordinate Court of competent jurisdiction.²¹ If the order is issued under the authority of the District Judge, the absence of his signature does not vitiate the proceeding.²² A Munsiff to whom a decree is sent for execution direct has no jurisdiction to execute it without the order of the District Judge.²³ A decree passed by a Civil Court in British India to which the provisions relating to execution do not extend, or by a Court established or continued by the authority of the Governor-General in Council in the territories of any Foreign Prince or State may be executed within the jurisdiction of any Court in British India.²⁴ The Court of Commissioners of Kandh within the family dominions of the Maharaja of Benares is a Court established by the Governor-General in Council in the territory of a Foreign Prince.²⁵

The decrees or any class of decrees of any Civil or Revenue Courts, situate in the territories of such Native Prince or State in alliance with His Majesty, as notified in the Gazette of India and not established, nor continued by the authority of the Governor-General in Council, may be executed in British India, as if they have been passed by the Courts in British India.²⁶ Similarly, the Courts in British India may send a decree for execution to any Court established, or continued by the authority of the Governor-General in Council in the territories of such Foreign Prince or State as may have been notified in the Gazette of India²⁷ An order rejecting an application for the transfer of a decree is appealable.²⁸

20. O. 21 r. 5 C. P. C. Act V of 1908.

21. O. 21 r. 8 C. P. C. Act V of 1908.

22. Jogendra Chandra v. Mahesh Chandra 23 Cal. 480.

23. Debi Dial v. Mohuraj Singh 22 Cal. 764.

24. S. 43 C. P. C. Act V of 1908.

25. Prabhu Narain v. Saligram 34 Cal. 576 : 11 C. W. N. 622 ; 6 C.L.J. 30.

26. S. 41 C. P. C. Act V of 1908.

27. S. 45 C. P. C. Act V of 1908.

28. Bhabani Charan v. Protap Chandra 8 C. W. N. 575.

LECTURE IV.

iii Court of
Collector.

The Local Government may, with the previous sanction of the Governor-General in Council, declare by notification in the local Official Gazette that in any local area, or in the case of any specified ward of the Court in Madras, the execution of decrees in cases in which the Court has ordered any moveable property or any particular kind of, or interest in, immoveable property to be sold shall be transferred to the Collector.²⁹ The object is to enable the chief executive officer of the District to liquidate the debts of encumbered land-holders without the immediate sale of their estates and to preserve the old landed gentry of the country.³⁰ Such a notification ousts the jurisdiction of the Court, so far as regards the execution of the decree.³¹ But the money realised by the Collector is at the disposal of the Court by which the decree has been sent to him for execution.³² The jurisdiction of any Court, other than the Court transmitting the decree to the Collector, is not taken away.³³ But if the Collector arrogates to himself the power which he has not, his order will be *ultra vires*, and a suit will lie in a Civil Court to set aside his order.³⁴ An order of the Collector is not open to appeal to the High Court.³⁵

Territorial
jurisdiction.

Territorial jurisdiction of the Court is a condition precedent to its executing decrees. In cases of decrees for sale of mortgaged properties, the Court may execute the decrees, if some of the properties are wholly outside its jurisdiction;³⁶ or if after the decrees have been passed, land is placed wholly under another jurisdiction, execution may be had, either in the Court which passed the decrees or the Court within whose jurisdiction it lies at the time of

29. S. 68 C. P. C. Act V of 1908 ; S. 45 (1) Act I (M. C.) of 1902.

30. Huro Prosad v. Kali Prosad 9 Cal. 290 at p. 294.

31. S. 70 (2) C. P. C. Act V of 1908 ; Sukldeo v. Sheo Ghulam 4 All. 382 ; Daulat Singh v. Jugil Kishore 22 All. 108 ; Muhammad v. Payag Sahu 16 All. 228.

32. Tapesri v. Deokinan Jan 16 All. 1.

33. Shiam Behari v. Rup Kishore 20 All. 379.

34. Pitta a v. Chunilal 31 Bom. 507 ; Narayan v. Rasulkhan 23 Bom. 521 ; Ganpatram v. Isaac 15 Bom. 322 ; Bai Amthi v. Madhav 15 Bom. 694 ;

Sheo Prosad v. Muhammad 25 All. 167 ; Sudho Chandrei v. Abhenandau 26 All. 101 ; Mathuradas v. Panhal 19 Bom. 216 ; Mathura Das v. Jamna 25 All. 355. 35. Mahcherji v. Thakurdas 7 Bom. L. R. 682.

36. Begg Dunlop & Co. v. Jagannath 39 Cd. 104 ; 16 C. W. N. 402 ; 11 C. L. J. 228 ; Maseyk v. Steel & Co. 11 Cal. 661 ; Kurtick Nath v. Tilukdhari 15 Cal. 667 ; Gopi Mohan v. Doylaki Nandan 19 Cal. 13 ; Tincouri v. Shib Chandra 21 Cal. 639 ; Latchman v. Maddan Mohun 6 Cal. 513 ; 7 C. L. R. 521 ; Jafar v. Kamalini 28 Cd. 238 ; 5 C. W. N. 150.

execution.³⁷ But in cases of decrees for money, if the property is situate *wholly* outside the local limits of its jurisdiction, the Court cannot execute the decrees so as to affect the property.³⁸ Where immoveable property, however, forms one estate or tenure, situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.³⁹

A Court to which a decree has been sent for execution has no jurisdiction to execute the decree, if the decretal amount exceeds the limits of its pecuniary jurisdiction, the proceedings in execution being merely a continuation of the suit.⁴⁰ A Court which has no jurisdiction to try a suit can have no jurisdiction to execute a decree passed in that suit.⁴¹ But when the decree sought to be executed is passed by a competent Court, the Court is not ousted of its jurisdiction to execute the decree, merely by reason of the amount of rent or mesne profits ascertained for a period subsequent to the institution of the suit, exceeding the pecuniary limits of the jurisdiction of such Court.⁴²

A decree may be simultaneously executed in more Courts than one, but as such executions would be oppressive, it is proper to impose terms on the decree-holder that he should not proceed to a sale under all the attachments at once.⁴³

When a decree is sent for execution, the Court to which it is sent has no jurisdiction, except for special reasons to be recorded by the

LECTURE IV.

Pecuniary jurisdiction.

Concurrent jurisdiction.

Construction of decree.

37. Kartick Nath v. Tilukdhari 15 Cal. 667 ; Latchman v. Maddan Mohun 6 Cal. 513 ; 7 C. L. R. 521 ; Surroop Chunder v. Ameerunissa 8 Cal. 703 ; Shib Narain v. Gobind Dass 23 W. R. 154 ; Prem Chand v. Mokhoda 17 Cal. 699 ; Kalipal v. Dino Nath 25 Cal. 315.

38. Dukhina v. Bilash 18 Cal. 525 ; Obhoy Churn v. Golam Ali 7 Cal. 110 ; 9 C. L. R. 361 ; Prem Chand v. Mokhoda 17 Cal. 699.

39. O. 21, r. 3 C. P. C. Act V of 1908. See also Kally Prosonto v. Dino-nath 11 B. L. R. 53 ; 19 W. R. 431 ; Gunga Narain v. Ananda 12 C. L. R. 404 ; Surroop Chunder v. Ameerrunissa 8 Cal. 703 ; Maseyk v. Steel & Co. 14 Cal. 661 ; Kartick Nath v. Tilukdhari 15 Cal. 667 ; Gopi Mohan v. Doybaki Nandan 19 Cal. 13 ; Jagernath v. Dip Rani 22 Cal.

871 ; Umocoool Chunder v. Hurry Nath 2 C. L. R. 331 ; Ram Lall v. Bama Sundari 12 Cal. 397 ; Tincouri v. Shib Chandra 21 Cal. 639.

40. Ram Kirpal v. Rup Kuari 11 I. A. 37 ; 6 All. 269.

41. Durga Charan v. Uma Tara 16 Cal. 465 ; Gokul v. Aukbil 16 Cal. 457 ; Sidheswar v. Harihar 12 Bom. 155 ; *contra* Narasimha v. Venkata Krishnayya 7 Mad. 397 ; Shannugur v. Ramanathan 17 Mad. 309.

42. Shumrav v. Niloji 10 Bom. 200 ; Runeswar v. Dilu 21 Cal. 550.

43. Suroda Prosad v. Luchmeepit 14 Moo. 529 ; 10 B. L. R. 211 ; 17 W. R. 289 ; Krishto Kishore v. Roop Lall 8 Cal. 687 ; 10 C. L. R. 609 ; Baij Nath v. F. H. Holloway 1 C. L. J. 315 ; Ranjas v. Guru Charan 14 C. W. N. 396 ; 11 C. L. J. 69.

LECTURE IV.

Judge, to require any further proof of the decree or order for execution.⁴⁴ Although the functions of a Court executing its own decrees, or those of other Courts transferred to it, are not ministerial but judicial, they are confined to effecting executions and matters arising out of the proceedings in executions.⁴⁵ Hence, the Court executing its own decree, or a decree transferred to it for execution, must take the decree as it stands.⁴⁶ The decree or order is conclusive and binding upon the parties, unless set aside on appeal or otherwise.⁴⁷ A Court executing a transferred decree cannot, therefore, entertain any objection, any more than the Court executing its own decree, as to the validity of an assignment, if the assignee is shown in the order for execution, as the person entitled to execute the decree.⁴⁸ Nor, can it entertain any objection as to the legality, or correctness of the decree, or order, or as to the jurisdiction of the Court which passed it, or that the decree was obtained by fraud.⁴⁹ But where the decree is sent for execution to another Court without any order for execution, it has power to decide whether execution is barred by limitation.⁵⁰

44. O. 21, r. 7 C. P. C. Act V of 1908; cf. S. 225 C. P. C. Act XIV of 1882.

45. S. 42 C. P. C. Act V of 1908; *Jadu v. Farrel* 6 B. L. R. App. 66.

46. *Harmanoje v. Ram Prosad* 6 C. L. J. 462; *Ramphal v. Ram Baran* 5 All. 53; *Muttia v. Virammal* 10 Mad. 283; *Budan v. Rani Chandra* 11 Bom. 537; *Venkatachala v. Venkatarama* 21 Mad. 665; *Appa Rao v. Krishna* 25 Mad. 537.

47. *Papamma v. Virapratapa* 23 I. A. 32; 19 Mad. 249; *Sundarappa v. Sreenarayulu* 30 Mad. 402.

48. *Ram Chunder v. Mohendro Nath* 21 W. R. 141; *Dhunesh v. Oolfut* 21 W. R. 219.

49. *Biswanath v. Bhagwanlin* 11 C. L. J. 648; *Chhoti v. Rameswar* 6 C. W. N. 796; *Hassan Ali v. Ganzi Ali* 31 Cal. 179; *Grish Chunder v. Soshi Shukhareswar* 27 I. A. 110; 27 Cal. 951; 4 C. W. N. 631; *Rash Behari v. Joynanda* 1 C. L. J. 175; *Debendra Nath v. Prasanna Kumar* 5 C. L. J. 328;

Benode v. Brajendra 29 Cal. 810; 6 C. W. N. 838; *Nagendrabala v. Sec. of State* 14 C. L. J. 83; *Maharaja of Bharatpur v. Rani Kanno* 28 I. A. 35; 23 All. 181; 5 C. W. N. 137; *Kashi v. Jamuna* 31 Cal. 922; *Subramanian v. Panjamma* 4 Mad. 324; *Abdul Hussain v. Sakhmaboo* 21 Bom. 456; *Chogall v. Truenan* 7 Bom. 481; *Kasturshet v. Rumi* 10 Bom. 65; *Rajerav v. Nararav* 11 Bom. 528; *Krishto Kishore v. Roop Lal* 8 Cal. 687; 10 C. L. R. 609; *Ram Lal v. Radhey Lal* 7 All. 330; *Ber Chunder v. Mymana* 5 Cal. 736; *Husain v. Saju* 15 Bom. 28; *Sadasiv v. Jayantibai* 8 Bom. 185; *Madho Lal v. Katwari* 10 All. 130; *Parvata v. Digamber* 15 Bom. 307; *Sudindra v. Buelin* 9 Mad. 80; *Dhuni Ram v. Luchmeswar* 23 Cal. 639.

50. *Chhotey Lal v. Puran Mull* 23 Cal. 39; *Leake v. Daniel* 10 W. R. 10 (F. B.); 6 B. L. R. Sup. 970; *Sripati Charan v. R. Belchambers* 15 C. W. N. 661.

A Court executing a decree cannot alter, vary, or add to, the terms of the decree, even by consent of the parties.⁵¹ But it is quite competent to construe the decree, where the terms of the decree are ambiguous. The construction should be based upon the pleadings and judgment and should be in accordance with law.⁵² Where a certain construction has been put on the decree on a former occasion, a different construction cannot be put on a subsequent occasion.⁵³ An agreement arrived at between the parties to an execution proceeding with the sanction of the Court cannot be subsequently altered by the Court without the consent of both the parties.⁵⁴

The decree transferred does not lose its original character and the Court executing it treats it in all respects as if it were passed by itself.⁵⁵ It retains its jurisdiction, until the execution has been withdrawn from it, or until it has certified the execution or non-execution of the decree to the Court which sent it for execution.⁵⁶

Mode of execution.

When the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner, as if it had been passed by such Court in the exercise of its Ordinary Original Civil Jurisdiction.⁵⁷ Where a decree has been passed in a suit, of which the value, as set forth in the plaint, did not exceed two thousand rupees and which, as regards its subject matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or Provincial Court of Small Causes, it may be executed by the Court of Small Causes in Calcutta, Madras, Bombay, or Rangoon, as if it had been passed by itself.⁵⁸

51. Udwant Singh v. Tokhan Singh 28 I. A. 57; 28 Cal. 353; Kristo Komal v. Huree Sirdar 13 W. R. 41; Forester v. Sec. of State 4 I. A. 137; 3 Cal. 161; Hurro v. Surut 9 I. A. 1; 8 Cal. 332; Madan Mohan v. Bhikhar 16 C. L. J. 517; Raghunath v. Kashi Prosad 15 C. L. J. 678; Ishwargar v. Chundasama 13 Bom. 106; Subbana v. Krishna 15 Bom. 644; Rammal Sangji v. Kundan Kuwar 26 Bom. 707.

52. Kali Krishna v. Sec. of State 15 I. A. 186; 16 Cal. 173; Jagatjit v. Sarabjit 18 I. A. 165; 19 Cal. 159; Lachmi v. Jwala 18 All. 344; Shivlal v. Junaklal 18 Bom. 542; Amolak v. Lachmi 19 All. 174; Bakar v. Udit

Narain 21 All. 361; Radha Kissen v. Coll. of Jaunpur 28 I. A. 28; 23 All. 220; 5 C. W. N. 153.

53. Venkatamarasimha v. Papemudi 19 Mad. 54.

54. Chandrabala v. Prabodh 36 Cal. 422; 9 C. L. J. 251.

55. Ram Lochan v. Beni Prasad 36 Cal. 252; 13 C. W. N. 791; 9 C. L. J. 125.

56. Ashootosh v. Doorga Churn 6 Cal. 504; 8 C. L. R. 23; Abdla Begum v. Muzaffar 20 All. 129; Manorath v. Ambika 13 C. W. N. 533; 9 C. L. J. 443.

57. O. 21, r. 9 C. P. C. Act V of 1908.

58. O. 21, r. 4 C. P. C. Act V of 1903.

LECTURE IV.

Persons
competent
to execute
decrees.

i. Joint
decree-holders

The death of one of several decree-holders neither suspends, nor destroys the right to issue execution, unless, by the terms of the decree, execution has been dependent on all the decree-holders joining in the execution. Any one of the several joint decree-holders may, therefore, with the leave of the Court, execute the whole decree for the benefit of them all and orders may be passed for protecting the interest of the persons who have not joined in the execution.⁵⁹ The managing member of a joint Hindu family can execute decrees on behalf of the family.⁶⁰ It is not obligatory on the Court, before making an order for execution, to give notice to the other decree-holders or to the judgment debtors.⁶¹

A joint decree cannot, however, be executed by one of several decree-holders in respect of his share only of the decree, unless the extent of such share is determined by the decree or admitted.⁶² An order determining any question between a decree-holder on one side and the judgment-debtor on the other is appealable.⁶³

ii. Assignee.

As the decree-holder is the only person entitled to the fruits of the judgment, it is obvious that when he has assigned his interest in the decree to another, his right to execute it also ceases.⁶⁴ The assignment may doubtless be involuntary as well as voluntary and whenever any person has by operation of law becomes entitled to the proceeds of the judgment, he is entitled to the execution therein. But a voluntary assignment must be in writing and a transferee under an oral assignment has no *locus standi* to apply for execution.⁶⁵ The assignee by operation of law, i.e., the legal representative of a

59. O. 21, r. 15 C. P. C. Act V of 1908; Tarasundari v. Behary 1 L.R. 1 B. L. R. A. C. 28; Farzand v. Abdullah 6 All. 69; Ahmed v. Shuhzada 7 C. L. R. 537; Budruddin v. Golam Moidin 36 Mad. 357.

60. Achhaibar v. Ram Sarup 35 All. 380.

61. Durga Das v. Deoraj 33 Cal. 306; 10 C. W. N. 297.

62. Coll. of Shahjehanpur v. Surjan 1 All. 72; Banarsi v. Maharani 5 All. 27; Dalichand v. Bai Shivkar 15 Bom. 242; Kishore Chaud v. Gisborne & Co. 17 Cal. 341; Seetaput v. Ali Hossein 24 W. R. 11; Muthuseni v. Natesa 18 Mad. 464; Hurrish Chunder v. Kali-

sundari 10 I. A. 4; 9 Cal. 482; 12 C. L. R. 511; Taruek v. Dinendro 9 Cal. 831; 12 C. L. R. 563; Sultan v. Sa alayammal 15 Mad. 343; Tannau Singh v. Lachman 26 All. 318; Moti Ram v. Hannu 26 All. 331; Lachman v. Chaturbhuj 28 All. 252.

63. Lakshmi v. Ponnasse 17 Mad. 394; Ratnaih v. Bai Gulab 23 Bom. 623;

64. Duriao v. Doolla 24 W. R. 10; Venubai v. Coll. of Nasik 7 Bom. 552 n; Jeldi Subraya v. Ramrao 22 Bom. 998.

65. O. 21, r. 16 C. P. C. Act V of 1908; Parvata v. Digambar 15 Bom. 307; Javernal v. Umji 9 Bom. 179; Mu-thunarayana v. Balkrishna 19 Mad. 303.

deceased decree-holder, or the Official Assignee in the case of an insolvent decree holder, or the purchaser of a decree at a sale in execution of a decree against the decree-holder, may similarly execute the decree.⁶⁶ An assignee may take from the decree-holder directly or through his assignor.⁶⁷ The transferee may also be of a portion of the decree.⁶⁸

The assignee need not make a formal application for substitution of his name.⁶⁹ But notice to the assignor and the judgment-debtor, which is necessary to prevent undue surprise, is a condition precedent to the execution of a decree by the assignee. If no notice is given, the Court has no power to execute.⁷⁰ The transferee may apply to the Court which passed the decree to send it for execution to another Court.⁷¹ The notice must be issued by the Court which passed the decree and not by the Court to which it is sent for execution.⁷² The assignee is entitled to execution as of right like the original decree-holder : the Court has no discretion to grant or refuse the application.⁷³ An assignee of a decree for maintenance can execute it like the original decree holder.⁷⁴ A decree for money and costs cannot be separately transferred and executed.⁷⁵

The assignee, however, holds the decree subject to the equities (if any) which the judgment-debtor might have enforced against the

66. Khandev v. Ganesh 11 Bom. 368 ; Umaseondury v. Brojo Nath 16 Cal. 347 ; Sethurayar v. Shannugan 21 Mad. 363 ; Wise v. Abdool Ali 7 W. R. 136.

67. Amar Chundra v. Guru Prosunno 27 Cal. 488 ; Ganga Das v. Yakub Ali 27 Cal. 670.

68. Kishore Chaud v. Gisborne & Co. 17 Cal. 341 ; Muthunarayana v. Balkrishna 19 Mad. 306 ; Gyamonee v. Radha 5 Cal. 592 ; Dwar Buksh v. Fatik 26 Cal. 250 ; 3 C. W. N. 222,

69. Mammotha Nath v. Rakhal Chandra 14 C. W. N. 752 ; 10 C. L. J. 396 ; Javermal v. Umaji 9 Bom. 179 ; Jengendra v. Shyam Das 36 Cal. 543 ; 9 C. L. J. 271.

70. O. 21, r. 16 C. P. C. Act V of 1908 ; Gulzari v. Daya Ram 9 All. 46 ; Khushroobhai v. Hormazsha 11 Bom. 727 ; Kassum Goolam v. Dayabhai Amarsi 36 Bom. 58 ; Sreenath v. Achutananda

11 C. L. J. 354.

71. Chattoth v. Saidiudavide 26 Mad. 258.

72. O. 21, r. 16 C. P. C. Act V of 1908 ; Nando Lal v. Chutterput 29 Cal. 235 ; Tameshar v. Thakur Prasad 25 All. 443 ; Framji v. Ratansha 9 Bom. H. C. 49 ; Kadir Buksh v. Ilahi Buksh 2 All. 283 ; Amar Chundra v. Guru Prosunno 27 Cal. 488.

73. Cf. 242 C. P. C. Act XIV of 1882. The words "if the Court thinks fit" have been omitted from O. 21, r. 16 C. P. C. Act V of 1908. See also Megh Narayan v. Radha 4 B. L. R. A. C. 230 ; 13 W. R. 224 ; Parvata v. Digambar 15 Bom. 307.

74. Asad Ali v. Haidar Ali 12 C. L. J. 130.

75. Ram Chandra v. Abdul Hakim 35 All. 204.

LECTURE IV. original decree-holder.⁷⁶ Thus, if the judgment-debtor has the right or equity to set off his cross-decree against the decree-holder, the transferee will hold the decree subject to such right or equity.⁷⁷ A transferee of a decree or a transferee from such a transferee is a representative of the decree-holder.⁷⁸ An order determining any question between him and the judgment-debtor, is therefore, appealable.⁷⁹ But the transferee whose application is dismissed on the ground that the assignment is invalid, is not precluded from bringing a suit for a declaration as to the validity of the assignment.⁸⁰

iii. Judgment-debtor.

Where a decree for payment of money has been transferred wholly or in part to one of several judgment-debtors, the decree is wholly or partially extinguished.⁸¹ The rule will not apply when the decree is separately given against different persons,⁸² nor, where the decree is not against the defendant personally but as representative of other persons.⁸³ When one of the judgment-debtors purchases a rent decree, such a purchase is equivalent to payment of the decree and he can bring a suit for contribution against the co-judgment-debtors.⁸⁴

iv. Stranger.

A stranger may acquire an equitable right to the benefit of execution, or on the property upon which it is levied, and such equitable right may give him authority to sue out and conduct the process, or to object to its regularity or validity; but he cannot do so by proceeding in the case in his own name ; he must do it in the name of a legal party to the process or one who can be made so. Thus, as money-decrees and mortgage-decrees cannot be sold, the decree-holder, who attaches these decrees of his judgment-debtor, may execute them in the same manner as the judgment-debtor, the

76. S. 49 C. P. C. Act V of 1908.

413 ; Badri Narain v. Jai Kishen 16

77. O. 21, r. 18, 19 C. P. C. Act V

All. 483 ; Subbuthayyamal v. Chidam-

baran 25 Mad. 383.

78. Ishan Chunder v. Beni Madhub 26

Cal. 62 ; 1 C. W. N. 36 ; Gulzari Lal

v. Madho Ram 26 All. 447 ; Dwarukesh

v. Fatik 26 Cal. 250 ; 3 C. W. N. 222 ;

Badri Narain v. Jai Kishen 16 All. 483 ;

Ganga Das v. Yakub Ali 27 Cal. 670.

79. Ganga Das v. Yakub Ali 27 Cal.

670 ; Tamesher v. Thakur Prasad 25 All.

18 C. W. N. 195.

80. Pancharand v. Sundarabai 31

Bom. 308.

81. Anant v. Nagappa 32 Bom. 195.

82. Pancharand v. Sundarabai 31

Bom. 308.

83. Pancharand v. Sundarabai 31

Bom. 308.

84. Ram Lal v. Khirode Mohini 18

C. W. N. 113.

original decree-holder, can do; and for this purpose the attaching decree-holder shall be deemed to be the representative of his judgment-debtor, the original decree-holder.⁸⁵

A Benamdar or ostensible transferee cannot execute a decree.⁸⁶ But if the execution proceedings had been allowed to be taken by the Court without notice of the fact, the proceedings would not be set aside as void but would be binding on the real decree-holder who may be allowed to conduct the further proceedings himself.⁸⁷

A person desirous of enforcing a judgment or order can do so without applying to the Court for leave. But the leave of the Court is necessary, if a decree against a firm is sought to be executed against a partner who was not served with the summons and who did not appear at the hearing.⁸⁸ Similarly, no execution can issue in suits between co-partners without leave of the Court.⁸⁹

The appointment of a Receiver is for the benefit of all parties to the suit.⁹⁰ A Receiver being an officer of the Court, an attachment of property in his hands would interfere with the jurisdiction and administration of justice of the Court and so it cannot be made without previous permission or sanction of the Court.⁹¹ Leave to proceed against a Receiver may be obtained after the application for execution has been presented.⁹² But property may be attached and sold after the order for a Receiver is made and before it is perfected,⁹³ or before an order of adjudication is made.⁹⁴ An anticipatory attachment of money expected to reach the hands of a public officer cannot be made.⁹⁵

LECTURE IV.

v. Benamdar.

Leave of Court.

Receiver.

85. O. 21, r. 53 (3) C. P. C. Act V of 1908. See also *Sah Man v. Kanasabapathi* 16 Mad. 20; *Jogendra Nath v. Hiranya Kumar* 2 C. L. J. 499; *Gopal Nana v. Joharimal* 16 Bom. 522; *Baij Nath v. Binoyendra Nath* 6 C. W. N. 5; *Krishnan v. Venkatapathi* 29 Mad. 318.

86. *Abdul v. Chukhun* 5 C. L. R. 253; *Denonath v. Lullit Coomar* 9 Cal. 633; 12 C. L. R. 146; *Gour Sunder v. Hem Chunder* 16 Cal. 355; *Balkishen v. Bednati* 20 Cal. 388.

87. *Manikkam v. Tatayya* 21 Mad. 388.

88. O. 21, r. 50 (2) C. P. C. Act V of 1908.

89. O. 30, r. 9 C. P. C. Act V of

1908.

90. *Harihar v. Harendra Nath* 37 Cal. 754; 12 C. L. J. 252.

91. *Kewney v. Attril* (1886) 31 Ch. D. 345; *Leima Ashton v. Madhabnmoni* 11 C. W. N. 560; 11 C. L. J. 489; *Mahammed v. Mahomed* 21 Cal. 85; *Kahn v. Ali Mahomed* 16 Bom. 577.

92. *Maharaja of Burdwan v. Apurba Krishna* 14 C. L. J. 50; *Sarat Chandra v. Apurba Krishna* 14 C. L. J. 55; *Banku v. Harendra* 15 C. W. N. 54.

93. *Edwards v. Edwards* (1876) 2 Ch. D. 291 C. A.

94. *Ishvar Lakhmidat v. Harjivan Ranji* 21 Bom. 681.

95. *Tulaji v. Balabhai* 22 Bom. 39.

LECTURE IV. The power and authority of the Courts extend over every class of persons and every species of property situate within the territorial limits in which the Courts are authorized to act. It would be a contradiction of terms to say that all persons may be bound by judgments and then to declare that some persons are exempt from having executions issued against them. In other words, when a judgment is valid against the defendant, an execution based upon it must, unless expressly forbidden by statute, be equally valid.⁹⁶ But, when the Collector under the Court of Wards has assumed the superintendence of any person or property and published a notice calling upon all persons having claims against the ward or his property, no proceeding in execution against the ward or his property shall be instituted.⁹⁷

As execution is authorized for the purpose of making effectual the decree or order of the Court, it must necessarily follow that a person who has obtained an unconditional decree or order is, as a general rule, entitled to issue execution forthwith, without even waiting a reasonable time, or without making any formal demand of performance, unless process is stayed by some order or rule of Court.⁹⁸ But when the decree is against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by him in his official capacity, no execution shall issue, unless it remains unsatisfied for three months from the date when the Court has reported the case for the orders of the Local Government.⁹⁹

Execution
on dormant
judgments.

Before a judgment is either satisfied by payment or barred by lapse of time, it may become temporarily inoperative, so far as the right to issue execution is concerned, and so continue until something is done by which such right is revived. In this condition it is usually called a *dormant judgment*. This dormancy in judgment is usually created, either by a change in the parties, plaintiff or defendant, or by the lapse of time without the issue of execution.¹⁰⁰ A person wishing to execute a decree or order is not bound to give any notice of its execution to the opposite party, but where the application for execution is made (*a*) more than one year after the date of the decree, or (*b*) against the legal representative of a party

96. Freeman on Executions § 22.

1908; Smith v. Smith (1874) L. R. 9

97. S. 21 Act IV (U. P. C.) of 1912;

Ex. 121.

S. 17 Act I (B. C.) of 1905.

99. S. 82 C. P. C. Act V of 1908.

98. O. 21, r. II (1) C. P. C. Act V of

100. Freeman on Executions § 81.

to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for, to show cause why the decree should not be executed against him. But no such notice is necessary, if the application is made within one year from the date of the last order passed on any previous application for execution against the same person, or if upon a previous application for execution against the legal representative of the judgment-debtor, the Court has ordered execution to issue against him, or if for reasons to be recorded, the Court considers that the issue of such notice would cause unreasonable delay, or would defeat the ends of justice.¹⁰¹ Notice should be issued by the Court which has seized of the application for execution¹⁰² The object of issuing notice is to prevent surprise to the judgment-debtor.¹⁰³ It is the duty of the Court to issue a notice, although the decree-holder may not have formally asked for the issue of such notice.¹⁰⁴ The issue of notice, unless dispensed with, is a condition precedent to the execution of the decree and until it is issued, the Court has no jurisdiction to proceed with the execution. The omission is not merely an irregularity, but it is an illegality which vitiates all the proceedings in execution.¹⁰⁵ But, where a notice has been issued, though to a wrong person, the execution proceedings are not void.¹⁰⁶ An application for setting aside a sale for want of notice is a proceeding under S. 47 C. P. C. Act V of 1908.¹⁰⁷

The judgment-debtor may plead to a notice anything which exonerates him from liability, or that the judgment is void, as the

101. O. 21 r. 22 C. P. C. Act V of 1908.

102. Sripati Charan v. R. Belchambers 15 C. W. N. 661.

103. Jogendra v. Shyam Das 36 Cal. 513; 9 C. L. J. 271; Kamini v. Aghore 14 C. W. N. 357; 11 C. L. J. 91.

104. Jagannath v. Brojo Nath 29 Cal. 590; E. H. Stevens v. Kamta Pershad 10 C. L. J. 19; Kalanand v. Chandra Kishore 14 C. W. N. 971; 12 C. L. J. 192; Jogendra Nath v. Rasik Chandra 2 C. L. J. 544.

105. Gopal Chunder v. Gunamoni 20 Cal. 370; Sahdeo v. Ghasiram 21 Cal. 19; Ramessuri v. Doorga Das 6 Cal. 193; 7 C. L. R. 85; Imam un nissa v.

Liakat Hussain 3 All. 424; Radha Prasad v. Lal Sahab 17 I. A. 150; 13 All. 53; Khiarajmal v. Daim 32 I. A. 23; 32 Cal. 296; 9 C. W. N. 202; 1 C. L. J. 584; Parashram v. Balmukund 32 Bom. 572; Kunud Bewa v. Prasanna Kumar 40 Cal. 45.

106. Malkarjun v. Nurhari 27 I. A. 216; 25 Bom. 337; 5 C.W.N. 10, on appeal from Erava v. Sidramappa 21 Bom. 424, explained in Levina Ashton v. Madhab moni 14 C. W. N. 560; 11 C. L. J. 489.

107. Parashram v. Balmukund 32 Bom. 572; Levina Ashton v. Madhab moni 14 C. W. N. 560; 11 C. L. J. 489, distinguished in Kunud Bewa v. Prasanna Kumar 40 Cal. 45.

LECTURE IV. Court never obtained jurisdiction of the person of the defendant. But no defence can be made which existed anterior to the judgment, nor, which is so inconsistent with the judgment that the maintenance of the defence implies, or establishes the falsity of the facts upon which the judgment rests. Of course, the judgment-debtor may show that the judgment has been satisfied, or that from some cause occurring since the rendition of the judgment, the decree-holder is no longer entitled to execution. He cannot attack the judgment collaterally for fraud and irregularity.¹⁰⁸ When the Court has disposed of the objection (if any) it may order the decree to be executed.¹⁰⁹ The judgment is not a new judgment, giving vitality only from that time but it is a revival of the original judgment giving, or rather containing, the vitality of the original judgment with all its incidents. If the original judgment is void the objection can be urged after its revivor.¹¹⁰

Execution
against legal
representa-
tive.

Where a judgment-debtor dies before the decree has been fully satisfied, the decree may be executed against the legal representatives of the deceased.¹¹¹ Although, when once the property is attached, it is in the hands of the Court, still if the judgment-debtor dies before sale and full satisfaction of the decree, his representatives must be brought on the record.¹¹² All proceedings taken without making the legal representatives parties are void and it is not the duty of the legal representatives to inform the decree-holder that the proceedings adopted by him are illegal.¹¹³ If the legal representatives of a deceased judgment-debtor die before the decree has been fully satisfied, the decree may similarly be executed against the legal representatives of such legal representatives.¹¹⁴

The "legal representative" means a person who in law represents the estate of a deceased person and includes any person who

108. Freeman on Executions § 90.

109. O. 21, r. r. 23, 24 C. P. C. Act V of 1908.

110. Freeman on Executions § 93.

111. S. 50 C. P. C. Act V of 1908.

112. Cf. S. 234 C. P. C. Act XIV of 1882. The word "satisfied" has been substituted for the word "executed" in S. 50 C. P. C. Act V of 1908. See also Ramasami v. Bagirathi 6 Mad. 180; Groves v. Administrator General

22 Mad. 119; Sheo Prasad v. Hira Ld

12 All. 440; Abdul Rahman v. Shankar 17 All. 162; Aba v. Dhondu 19 Bom. 276; Net Lall v. Kareem 23 Cal. 686.

113. Radha Prasad v. Ld Sahab 17 I. A. 150; 13 All. 53; Jamardhan v. Ram Chandra 26 Bom. 317; Beni Prasad v. Mukteswar 21 All. 316.

114. Jafri Begum v. Saira Bibi 22 All. 367.

intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.¹¹⁵ Thus, where a judgment-debtor dies and a person, whether he is a stranger or a residuary legatee under his will, applying for letters of administration with the will annexed, takes possession of his property, he is a legal representative.¹¹⁶ But the purchaser of the business of a firm against which a decree has been passed, is not the legal representative of the firm.¹¹⁷ An application against the legal representatives of a person against whom the decree purports to have been passed but who died before the hearing is not maintainable.¹¹⁸

The application for execution against a legal representative must be made to the Court which passed the decree, even if the judgment-debtor dies after the decree is or has been sent for execution to another Court.¹¹⁹ An order determining whether a certain person is or is not the legal representative of a party is appealable.¹²⁰

The legal representative of a deceased judgment-debtor cannot impeach the validity of any proceeding lawfully taken, during the life time of the deceased.¹²¹ His liability is limited to the property of the deceased which has actually come to his hands and has not been duly disposed of.¹²² If the decree-holder seeks to make the legal representative liable for the property of the deceased which, with due diligence on his part, would have come to his hands, his proper remedy is by way of suit against the legal representative and not by execution proceedings.¹²³ The legal representative is bound

115. S. 2 (1) C. P. C. Act V of 1908 ; see also *Dinanoni v. Elahadut Khan* 8 C. W. N. 843.

116. *Chuni Lal v. Osmond Beeby* 30 Cal. 1044.

117. *Harish Chandra v. Chandpore Co.* 30 Cal. 961 ; *Arbuthnot's Industrials v. Muthu Chettiar* 31 Mad. 464.

118. *Narendra Bahadur v. Gopal Sah* 17 C. L. J. 634.

119. S. 50 (1) C. P. C. Act V of 1908 ; see also *Durga Das v. Untul Hosein* 9 C. L. J. 239 ; *Hirachand v. Kasturchand* 18 Bom. 224 ; *Seth Sharupuri v. Shaukar* 17 All. 431 ; *Swaminatha*

v. Vaidyanatha

24 Mad. 46 ; *contra*

Sham Lal v. Modhu Sudan 22 Cal. 558.

120. S. 47 C. P. C. Act V of 1908 ; *Badri Narain v. Jai Kishen* 16 All. 483 ; *Krishnam v. Appasami* 25 Mad. 545 ; *Ganga Das v. Yakub Ali* 27 Cal. 670 ; *Waresh Munshi v. Aftabuddi Bepari* 16 C. L. J. 96.

121. *Mulchand v. Chaggan* 10 Bom. 74 ; *Liladhar v. Chaturbhuj* 21 All. 277 ; *Jagar Nath v. Shoo Ghulam* 31 All. 15.

122. S. 50 (2) C. P. C. Act V of 1908.

123. *Khushrohai v. Hormazsha* 11 Bom. 727 ; *Saratmani v. Batta Krishna* 35 Cal. 1100 ; 12 C. W. N. 614.

LECTURE IV. to pay to the decree-holder the full amount of the decree, though there may be other creditors of the deceased and the assets may be insufficient to pay them in full.¹²⁴

If the decree be passed against the legal representative of a deceased person for payment of money out of the property of the deceased, it may be executed against such property in his hands, and if he fails to satisfy the Court that he has duly applied such property, the decreee may be executed against him personally to the extent of the property in respect of which he has so failed to satisfy the Court.¹²⁵ Thus, an executor or administrator is bound to pay all debts of the deceased equally and rateably as far as the assets of the deceased will extend and a secured creditor cannot claim a right of priority over another.¹²⁶ A creditor of a deceased person who has obtained a decree against his executor or administrator but who has not been paid equally and rateably with the other creditors may proceed against him personally, on the ground that the property of the deceased has not been duly applied. But every payment made by the heir of a deceased Hindu or Mahomedan on account of debts due by the deceased would be a due application of the assets, whether the debts were paid equally and rateably or not.¹²⁷ A decree for mesne profits obtained against an alleged adopted son of the wrongdoer but who was found in another suit not to be validly adopted, cannot be executed against him, as he has not received any assets of the wrongdoer, nor against the real representative, because he was no party to the suit.¹²⁸

Property in the hands of a son or other descendant liable under the Hindu law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative.¹²⁹ The whole ancestral property is liable for the satisfaction of the judgment-debt.¹³⁰ If the son or other descendant object that the debt in respect of which the decree was passed was tainted with immorality, the question

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| 124. Venkataramayyan v. Krishnasami
22 Mad. 194. | C. W. N. 173 ; 18 C. L. J. 362. |
| 125. S. 52 C. P. C. Act V of 1908. | 129. S. 53 C. P. C. Act V of 1908. |
| 126. S. 104 P. & A. Act V of 1881 ;
S. 282 I. S. Act X of 1865. | 130. Muddum Thirkoor v. Kuntoo Lall
11 A. 321 ; 11 B. L. R. 187 ; 22 W. R.
56 ; Nanom Baburam v. Moilam Mohun
13 I. A. 1 ; 13 Cal. 21 ; Leelmi Prasad
v. Basant Lal 16 C. L. J. 85. |
| 127. Veerasokkaraju v. Papish 26
Mad. 792. | |
| 128. Ashi Bhushan v. Pelarum 12 | |

is one "relating to the execution of the decree" and should be determined by "the Court executing the decree."¹³¹ Where the father dies after attachment of the ancestral property, or the decree is a mortgage decree, the proceedings in execution can be continued against the sons and a separate suit will be barred.¹³²

The law of limitation applicable to the execution of a decree depends upon the Court by which it was passed and not upon the Court executing it.¹³³ Thus, an application to enforce a judgment, decree, or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, or an order of His Majesty in Council, whether it affirms, modifies or reverses the order of the Court below, must be made within twelve years when the right to enforce it accrues, or when it has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person liable or his agent; the twelve years shall be computed from the latest date of such revivor, payment, or acknowledgment.¹³⁴ To constitute a revivor there must be an order for execution of the decree or order.¹³⁵ When the order is issued without notice to the judgment-debtor under O. 21,

Period of limitation for execution.

131. S. 47 C. P. C. Act V of 1908; see Umed v. Goman Bhaiji 20 Bom. 385; Shivram v. Shakharan 33 Bom. 39; Amar Chandra v. Sebak Chand 34 Cal. 642; 11 C. W. N. 593; 5 C. L. J. 491; Lachmi Prasad v. Basant Lal 16 C. L. J. 85. See the contrary view taken by the Allahabad and Madras High Courts under Act XIV of 1882 in Jagannath v. Sitaram 11 All. 302; Lachmi Narain v. Kunji Lal 16 All. 449; Ravi Varma v. Narayana 5 Mad. 223; Venkatarama v. Senthivelu 13 Mad. 265.

132. S. 47 C. P. C. Act V of 1908; Sivagiri Zamindar v. Tiruvengada 7 Mad. 339; Lachmi Narain v. Kunji Lal 16 All. 449; Peary Lal v. Chandi Charan 11 C. W. N. 163; 5 C. L. J. 80; Chander Pershad v. Sham Koer 33 Cal. 676; Kuriyal v. Mayan 7 Mad. 255; Hira Lal v. Parmeshar 21 All. 356.

133. Tincowrie v. Debendro Nath 17

Cal. 491; Jagemaya v. Thackomoni 24 Cal. 473; Sree Krishna v. Alumbi Ammal 36 Mad. 108.

134. Art. 183 Sch. I Limitation Act IX of 1908; Kamini v. Aghore 14 C. W. N. 357; 11 C. L. J. 91; Luchmun v. Kishun 8 Cal. 218 (F. B.); 10 C. L. R. 425 (F. B.); Bhoobeona v. Jobraj 11 C. L. R. 270; Majid v. Jawahir 33 All. 154.

135. Ashootosh v. Doorga Churn 6 Cal. 504; 8 C. L. R. 23; Futtel Narain v. Chandrabati 29 Cal. 551; Kamini v. Aghore 14 C. W. N. 357; 11 C. L. J. 91; Monohar v. Futtel Chand 30 Cal. 979; 7 C. W. N. 793; Soja Hossein v. Monohar Das 24 Cal. 244 reversing the same case in 22 Cal. 921; Umrao Singh v. Lachmi 26 All. 361; Ganapathi v. Balasundara 7 Mad. 540; Jogendra v. Shyam Das 36 Cal. 543; 9 C. L. J. 271.

LECTURE IV. r. 22 C. P. C. Act V of 1908 it does not "revive" the judgment.¹³⁶

Decree or
order of Civil
Court.

An application for execution of a decree or order of any other Civil Court should be made within three years, or where a certified copy of the decree or order has been registered within six years from any of the following dates :—¹³⁷

1. Date of
decree or
order of origi-
nal court.

1. The date of the decree or order, *i.e.*, the date which the decree ought to bear under O. 20, r. 7 C. P. C. Act V of 1908, namely, the date of the judgment.¹³⁸ The decree must be taken as a whole and when a portion of the decree is not executable by reason of the fact that the amount due under that portion is left to be determined at a future time, limitation begins to run as regards the whole decree from the time of ascertainment of the amount left undetermined.¹³⁹

2. Date of
decree or
order of ap-
pellate court.

2. Where there has been an appeal, the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, whether the original decree is affirmed, modified, or set aside on appeal ; for the decree of the first Court becomes incorporated with it and the decree of the Appellate Court is the only decree capable of execution.¹⁴⁰ The mere presentation of a memorandum of appeal is sufficient.¹⁴¹ So an order by which an appeal abates is in effect the final decree or order.¹⁴² The appeal need not relate to the whole matter in

136. Desoo v. Srinivasa 33 Mad. 137.

137. Art. 182 Sch. I Limitation Act IX of 1908.

138. Golam Gaffar v. Goljan Bibi 25 Cal. 109 ; Kali Prosunno v. Lal Mohun 25 Cal. 258 ; 2 C. W. N. 219 ; Ratnaehalam v. Venkatarama 29 Mad. 46 ; Muhammad Suleman v. Muhammad Yar 17 All. 39 ; Ali Ahmed v. Naziran 24 All. 542 ; Dildar Hossein v. Mujeedunnissa 4 Cal. 629 ; Krishnan v. Nilkandan 8 Mat. 137 ; Baroda v. Fergusson 11 C. L. R. 17 ; Ashrafuddin v. Bepin 30 Cal. 407 ; Raj Gir v. Iswar-dhari 11 C. L. J. 243 ; Rakhai Das v. Jogendra Narain 10 C. L. J. 467 ; 5 Ind. Cas. 660 ; Afzal Hossain v. Umda Bibi 1 C. W. N. 93 ; Yamaji v. Antaji 23 Bom. 442 ; Bhajan Behary v. Girish Chandra 17 C. W. N. 959.

139. Vyidianatha v. Subramania 36 Mad. 104.

140. Ashfaq Husain v. Gauri Sahai 38 I. A. 37 ; 33 All. 264 ; 13 C. L. J. 351 ; Mahomed Mehdi v. Mohini Kanta 34 Cal. 874 ; 7 C. L. J. 305 ; Gopal Chunder v. Gosain Das 25 Cal. 594 ; 2 C. W. N. 556 ; Sakhalchand v. Velchand 18 Bom. 203 ; Muhammad Sulaiman v. Muhammad Yar 11 All. 267 ; Nanehand v. Vithu 19 Bom. 258 ; Nar-sing v. Narain 2 All. 763 ; Gopal v. Joy-ram 7 Cal. 620 ; 9 C. L. R. 402.

141. Rup Singh v. Mukhraj 7 All. 887 ; Wazir Mahton v. Lulit Singh 9 Cal. 100 ; Akshoy Kumar v. Chunder Mohun 16 Cal. 250 ; *contra* Dianatullah v. Wajid Ali 6 All. 438.

142. Muhammad Razi v. Karbalai Bibi 32 All. 136 ; Mahomed Mehdi v. Mohini Kanta 34 Cal. 874 ; 7 C. L. J. 305 ; *contra* Fazal Husen v. Raj Bahadur 20 All. 124 ; Fazlur Rahman v. Muhammad Khan 30 All. 385.

controversy, nor, by, or, against all the defendants.¹⁴³ But where the decree contains separate orders against defendants separately, an appeal by one of them will not prevent limitation running in favour of the non-appealing defendants.¹⁴⁴ If the appeal by one defendant be a ground which attacks the whole decree, limitation runs from the date of the decree in appeal.¹⁴⁵ Where there has been an appeal against an order refusing to set aside an *ex parte* decree, limitation runs from the date of the order of the Appellate Court.¹⁴⁶

3. Where there has been a review of judgment, the date of the decision passed on the review.

An order passed upon an application amending a decree or a supplementary order determining the amount of costs not, settled in the judgment, is substantially an order passed upon a review of the judgment.¹⁴⁷ But an order rejecting a review does not save limitation.¹⁴⁸

4. Where the decree has been amended the date of the amendment.¹⁴⁹ An application for reconstruction of a lost decree does not

LECTURE IV.

3. Date of decision on review.

4. Date of amendment of decree.

143. Kristo Churn v. Radha Churn 19 Cal. 750; Nundun Lal v. Joykishen 16 Cal. 598; Badumissa v. Shams-ud-din 17 All. 103; Viraraghava v. Ponnammal 23 Mad. 60; Sakha-chand v. Velchaud 18 Bom. 203; Muhammad Sulaiman v. Muhammad Yar 11 All. 267; Abdul Rahiman v. Maidin Saiba 22 Bom. 500; Harkant v. Biraj Mohan 23 Cal. 876; Gopal Chunder v. Gosain Das 25 Cal. 594; 2 C. W. N. 556; Krishnana Chariar v. Mangammal 26 Mad. 91 (F. B.); Subramanya v. Alagappa 30 Mad. 268; Shivram v. Sakharam 33 Bom. 39.

144. Wise v. Rajnarain 1 B. L. R. 258; 10 W. R. 30; Raghu Nath v. Abdul Hye 14 Cal. 26; Mashiat-un-nessa v. Rani 13 All. 1 (F. B.)

145. Mulliek Ahmed v. Mahomed Syed 6 Cal. 194; 6 C. L. R. 573; Basant Lal v. Najmu-un-nessa 6 All. 14; Nurul Hasan v. Muhammad Hasan 8 All. 573; Gungamoyee v. Shib Sunkar 3 C. L. R. 430; Nundun Lal v. Joykishen 16 Cal. 598; Kristo Churn v. Radha

Churn 19 Cal. 750.

146. Lutful Huq v. Sumbhudin 8 Cal. 248; 10 C. L. R. 143; Baikanta Nath v. Aughore Nath 21 Cal. 387; contra Sheo Prasad v. Anrudh 2 All. 273; Jivaji v. Ram Chandra 16 Bom. 123; Ashfaq Husain v. Gauri Sahai 38 I. A. 37; 33 All. 264; 13 C. L. J. 351.

147. Kali Prosunno v. Lal Mohun 25 Cal. 258; 2 C. W. N. 219; Parameshwarya v. Seshagiriappa 22 Mad. 364; Viswanathan v. Ramanathan 21 Mad. 616; Venkata v. Venkata 24 Mad. 25; Rukhal Das v. Jogendra Narain 10 C. L. J. 467.

148. Joykishen v. Ataoor 6 Cal. 22; 6 C. L. R. 575; Kurupam v. Sadasiya 10 Mad. 66.

149. It removes the conflict of views in Kali Prosunno v. Lal Mohun 25 Cal. 258; 2 C. W. N. 219; Amar Chandra v. Asad Ali 32 Cal. 908; Kallu v. Fathiman 13 All. 121; Muhammad Suleman v. Muhammad Yar 17 All. 39; Daya v. Nanki 20 All. 304; Ahsanullah v. Dakkhini 27 All. 575.

LECTURE IV.

savc limitation.¹⁵⁰

5. Date of application for execution
(a) to proper Court,

5. The date of applying in accordance with law to the proper Court for execution, or to take some steps in aid of execution of the decree or order. A court to which an appeal has been preferred is not the proper Court.¹⁵¹ It is the Court whose duty it is to execute the decree or order, either by transfer, or otherwise.¹⁵² But an application *bona fide* presented to a wrong Court saves limitation.¹⁵³

The time runs from the date of applying and not the date on which the application is disposed of.¹⁵⁴ But the striking off of an application cannot keep the decree alive.¹⁵⁵ The application need not be a successful application.¹⁵⁶ When a decree is attached, the decree-holder cannot take any step to execute the decree, so as to save limitation.¹⁵⁷

(b) in accordance with law,

Whether an application for execution to take some step in aid of execution is or is not in accordance with law, has to be determined with reference to the circumstances of each case. The *bona fide* of the application is not of any consequence.¹⁵⁸ It is only material defects that vitiate an application.¹⁵⁹ Thus, an application for execution against

150. Raj Gir v. Iswardhari 11 C. L. J. 243; 5 Ind. Cas. 660; Rajkumar v. Rujlakhi 12 Cal. 411.

151. Kristo Coomar v. Mahabat 5 Cal. 595.

152. Expt. II Art. 182 Sch. I, Limitation Act IX of 1908. See E. H. Stevens v. Kamtu Pershad 10 C. L. J. 29; Prokash v. Poorno 21 W. R. 410; Roura Nath v. Gouri Sankar 2 C. W. N. 415.

153. Hira Lall v. Badri Dass 7 I. A. 167; 2 All. 792.

154. Troyloka v. Jyoti 30 Cal. 761; Sarat Kumary v. Jagat Chandra 1 C. W. N. 260; Trimbak v. Kishinath 22 Bom. 722; Ratan Chand v. Deb Nath 10 C. W. N. 303; 1 C. L. J. 539; Fakir Muhammad v. Ghulam Husain 1 All. 580 (F. B.); Mochai Mandal v. Meseruddin 13 C. L. J. 26; Raj Behari v. Kalihur 10 C. L. J. 479; Madan Mohan v. Ganga Chandra 17 C. L. J. 422.

155. Satyasaran v. Bhoirab Chandra 11 W. R. 150; 2 B. L. R. A. C. 193; Raghu Ram v. Damu Lal 2 All. 255.

156. Narsingh Dayal v. Kali Churan

14 C. W. N. 483; 5 Ind. Cas. 147; Shunkar Bisto v. Narsinghrao 11 Bom. 467; Adhar Chandra v. Lal Mohan 24 Cal. 778; 1 C. W. N. 676; Vinayak Vaman v. Ananda 34 Bom. 68; Abdul Majid v. Muhammed Faizullah 13 All. 89; Lalit Prasad v. Suraj Kumar 31 All. 309.

157. Unni Koya v. A. P. Ummi 35 Mvl. 622.

158. Rohini Nundan v. Bhogoban 22 W. R. 151; Eshu Chunder v. Pran Nath 22 W. R. 512; Shurut Chunder v. Abdoor Khyr 23 W. R. 327; Maracho v. Chintoorbhuj 23 W. R. 459.

159. Asgar Ali v. Troilokya Nath 17 Cal. 631 (F. B.); Gopd Sah v. Janki Koer 23 Cal. 217; Gopd Chunder v. Gosain Das 25 Cal. 594; 2 C. W. N. 556; Mathura Prasad v. Anuraga Koer 11 C. W. N. 481; Ramayyan v. Kalir Bacha 31 Mad. 68; Rama v. Varada 16 Mad. 142; Ramnandan v. Periatambai 6 Mad. 250; Hurry Churn v. Subayde 12 Cal. 161; Syud Mahomed v. Syud Abdoolah 12 C. L. R. 279; Kalla Dube v. Bisheshar 23 All. 162; Ramsoni v. Seshayyanger 6 Mad. 181;

persons who are not representatives of the judgment-debtor, or against a dead person,¹⁶⁰ or an application by a transferee of a decree under an unregistered deed of assignment,¹⁶¹ or an application by the legal representative of a deceased decree-holder without the production of a probate or certificate under S. 4 S. C. Act VII of 1889, or without a certificate from the Court which passed the decree authorising him to proceed with the execution,¹⁶² or an informal application if accepted by the Court,¹⁶³ or an application presented by the Vakil of the decree-holder although the vakalat-namah is not dated¹⁶⁴ is in accordance with law. But an application which does not comply with the requirements of O 21, r.r. 11—14 C. P. C. Act V of 1908 is not in accordance with law.¹⁶⁵ If it is amended within the time allowed by the Court it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.¹⁶⁶ S. 22 Limitation Act IX of 1908, does not govern execution proceedings.¹⁶⁷

The application need not be in writing but may be an oral application, or an application inferred from acts.¹⁶⁸ But an application

MacGregor v. Tarini Churn 14 Cal. 124 ;
Oodoychand v. Nobocoomar 10 W.R. 428.

160. Balkishen v. Bedmati 20 Cal. 388 ; Bepin Behari v. Bibi Zohra 35 Cal. 1047 ; Kalanand v. Chandra Kishore 14 C. W. N. 971 ; 12 C. L. J. 192 ; Samia Pillai v. Chockalinga 17 Mad. 75 ; Ramayyan v. Kadir Bacha 31 Mad. 68 ; Jogendra Nath v. Rasik Chandra 2 C. L. J. 544 ; Ramanuj v. Hingu Lal 3 All. 517 ; Krishnaji v. Muraray 12 Bom. 48 ; *contra* Gyanendra Nath v. Nihalo Bibi 32 All. 404.

161. Abdul Majid v. Muhammad Faizullah 13 All. 89.

162. Monorath v. Ambika 13 C. W. N. 533 ; 9 C. L. J. 443 ; Alagiriswamy v. Venkatachellapathy 31 Mad. 77 ; Brojo Nath v. Isswar Chundra 19 Cal. 482 ; Hari Badani v. Gobinda Chandra 9 C. L. J. 382 ; Hafizuddin v. Abdool Aziz 20 Cal. 755 ; Mangal Khan v. Salimullah 16 All. 26 ; Kalian Singh v. Ram Charan 18 All. 34 ; Balkishan v. Wagarsing 20 Bom. 76.

163. Autoo Misree v. Bidhoo Mookhee

4 Cal. 605 ; Dalichand v. Bai Shivkor 15 Bom. 242 ; Mathura Prosad v. Anurago Koer 14 C. W. N. 481 ; Pachiappa v. Poojali 28 Mad. 557 ; Nepal Chandra v. Amrita Lal 26 Cal. 888.

164. Subramania v. Ramchandra 26 Mad. 197.

165. Asgar v. Troilokya 17 Cal. 631 ; Gopal Sah v. Janki Koer 23 Cal. 217.

166. S. 148, O. 21, r. 17 (2) C. P. C.

Act V of 1908 ; Kalanand v. Chandra Kishore 14 C. W. N. 971 ; 12 C. L. J.

192. Under S. 245 C. P. C. Act XIV of 1882 the Court was not competent to extend the period of limitation ; see Gopal Sah v. Janki Koer 23 Cal. 217 ; Raghunatha v. Venkatesa 26 Mad. 101.

167. Manmotha Nath v. Rakhal Chandra 14 C. W. N. 752 ; 10 C. L. J. 396.

168. Bapuchand v. Mugutrao 22 Bom. 340 ; Amar Singh v. Tika 3 All. 139 ; Maneklal v. Nasia 15 Bom. 405 ; Keshavlal v. Pitamberdas 19 Bom. 261 ; Dharamnamia v. Subba 7 Mad. 303 ; Ambica Pershad v. Surdhari Lal 10 Cal. 851 ; Paroosh Ram v. Kali Puddo 17 Cal. 53.

LECTURE IV

not in accordance with the terms of the decree,¹⁶⁹ or subsequently withdrawn with or without leave of the Court by the decree-holder, unless withdrawn on the objection of the judgment-debtor,¹⁷⁰ or an application by the general attorney of a decree-holder resident within the local limits of the Court¹⁷¹ is not in accordance with law.

An application by any one of the joint decree-holders takes effect in favour of all, unless each has a distinguishing portion of the decree.¹⁷² Similarly, an application made against any one of the judgment-debtors takes effect against them all, unless each is liable for a distinguishing portion of the decree.¹⁷³ A decree does not cease to be joint, even by an arrangement made among the decree-holders to apportion their respective shares in the decretal amount.¹⁷⁴ An application for execution against some only of the judgment-debtors, although the judgment is not in its terms joint and several,¹⁷⁵ or for a partial execution of a decree¹⁷⁶ is in accordance with law.

(c) To take steps in aid of execution.

The application must be "to take some step in aid of execution," i.e., to obtain some order of the Court in furtherance of the execution of the decree,¹⁷⁷ or to initiate an execution.¹⁷⁸ It must be framed for some relief which the Court is competent to grant.¹⁷⁹ But whether

169. Pandarinath v. Lilachand 13 Bom. 237.

170. Thakur Prasad v. Fakir Ullah 22 I. A. 44; 17 All. 106; Tarachand v. Kashinath 10 Bom. 62; Wajihan v. Bishwanath 18 Cal. 462; Radha Kishen v. Radha Pershad 18 Cal. 315; Musaraf v. Amir 15 C. W. N. 71; 8 Ind. Cas. 833.

171. Murari Lal v. Umrao Singh 23 All. 499; Kasumri v. Beni Prasad 26 All. 19.

172. Preonath v. Prannath 8 W. R. 100; Dhanessuree v. Goodhur 11 W. R. 421; Hurnek Roy v. Zuhoree Mul 22 W. R. 468; Doya Moyee v. Nilmonee 25 W. R. 76; Shib Chunder v. Ram Chunder 16 W. R. 29; Ponnampilath v. Ponnampilath 3 Mad. 79; Manehand v. Kesari 31 Bom. 672.

173. Art. 182 Exp. I Sch. I Limitation Act IX of 1908; Hari v. Narayan 12 Bom. 127.

174. Indurjeet v. Mazum Ali 6 W. R. Mis. 76; Aodhi Beharee v. Brojo Mohun 13 W. R. 128; Nunkoo Lal v.

Dhunesh Kooer 17 W. R. 497.

175. Bhawani Koer v. Darsan Singh 14 C. L. J. 354; Barada Kinkar v. Nabin Chandra 11 C. L. J. 83; Bal Kishen v. Bedmati 20 Cal. 388; Radha Kishen v. Radha Pershad 18 Cal. 515; Nepal Chandra v. Amrita Lal 26 Cal. 888; Subramania v. Alagappa 30 Mad. 268; Lau I Credit Co. v. Fermoy (1870) 5 Ch. App. 323.

176. Dhanessuree v. Goodhur 11 W. R. 421; Nepal Chandra v. Amrita Lal 26 Cal. 888; Kalidas v. Varjivan 15 Bom. 215; Dalichand v. Bai Shivkar 15 Bom. 242; Keshavlal v. Pitamberdas 19 Bom. 261; Govind v. Appaya 5 Bom. 246.

177. Troylokya v. Jyoti 30 Cal. 761; 8 C. W. N. 251.

178. Roma Nath v. Gouri Sankar 2 C. W. N. 415.

179. E. H. Stevens v. Kamta Pershad 10 C. L. J. 19; Purna Chandra v. Radhamath 33 Cal. 867; 4 C. L. J. 141; Chattar v. Newal Singh 12 All. 64; Munawar Husain v. Jani Bijai 27

the Court could grant the relief is a question of fact.¹⁸⁹ So, whether a particular step is, or is not, in aid of execution, regard must be had not merely to the nature of the step to be taken but also to the circumstances.¹⁹¹ The decree-holder must show that he has applied to the Court to take some step in aid of execution.¹⁹²

An application during the continuance of a proceeding taken on a previous application,¹⁹³ or to enter up part satisfaction of the decree,¹⁹⁴ or to pay money realised in execution, determining if necessary the claims of the rival decree-holders,¹⁹⁵ or for substitution of the name of the transferee of a decree,¹⁹⁶ or praying for time to find out the address of the judgment-debtor or to issue notice on him of the transfer,¹⁹⁷ or to have an execution case struck off the file on the ground that the judgment-debtor has made arrangement with the decree-holder or satisfied the decree out of Court,¹⁹⁸ or to reject the judgment-debtor's application for setting aside the sale and to confirm the sale,¹⁹⁹ or for time to prove

Steps in
aid of execu-
tion.

All. 619 : Langtu Pande v. Baijnath 28 All. 387 ; Trimbak v. Kashinath 22 Bom. 722 ; Monorath v. Ambika 13 C. W. N. 533 ; 9 C. L. J. 443.

180. Bando Krishna v. Narasimha Konher 37 Bom. 42.

181. Ambika Perhsad v. Surdhari Lal 10 Cal. 851 ; Abdul Hossein v. Fazilun 20 Cal. 255 ; Kartick Nath v. Juggernath 27 Cal. 285 ; Hira Lal v. Dwija Charan 10 C. W. N. 209 ; 3 C. L. J. 210 ; Koormayya v. Krishnamma 17 Mad. 165 ; 3 M. L. J. 296.

182. Mulan Mohan v. Ganga Chandra 17 C. L. J. 422.

183. Paroosh Ram v. Kali Puddo 17 Cal. 53 ; Dalichand v. Bai Shivkar 15 Bom. 242.

184. Sujan Singh v. Hira Singh 12 All. 399 ; Tarini Das v. Bishtoo Lal 12 Cal. 608 ; Muhammad Husain v. Ram Sarup 9 All. 9 ; Wasi Imam v. Poonit Singh 20 Cal. 696 ; Sita D'n v. Sheo Prasad 4 All. 60 ; Rakhal Das v. Jogendra Narain 19 C. L. J. 467.

185. Koormayya v. Krishnamma 17 Mad. 165 ; 3 M. L. J. 296 ; Kerala

Varma v. Shangarm 16 Mad. 452 ; Venkatarayalu v. Narasimha 2 Mad. 174 ; Paran Singh v. Jawahir 6 All. 366 ; Apurba v. Chundermoney 10 C. W. N. 354 ; Bapuchand v. Mugutrao 22 Bom. 340 ; Nukanna v. Rama Sami 2 Mad. 218 ; Paroosh Ram v. Kali Puddo 17 Cal. 53 ; Jogesh v. Kalee Coomer 8 W. R. 274 ; Venkataramanamma v. Purushottam 24 Mad. 188 ; Bajj Nauth v. Ghanshyam 8 C. W. N. 382.

186. Annamala v. Ramier 31 Mad. 234 ; 18 M. L. J. 41.

187. Pitam Singh v. Tota Singh 29 All. 301.

188. Ghansham v. Mukha 3 All. 320 ; Sitla Din v. Sheo Prasad 4 All. 60 ; Muhammad Husain v. Ram Sarup 9 All. 9 ; Sujan Singh v. Hira Singh 12 All. 399 ; Rajlukhy v. Rash Munjary 5 C.L.R. 515 ; Tarini Das v. Bishtoo Lal 12 Cal. 608 ; Rakhal Das v. Jogendra Narain 19 C. L. J. 467.

189. Umesh Chundra v. Shib Narain 31 Cal. 1911 ; 9 C. W. N. 193 ; Kewal Ram v. Khadijum Husain 5 All. 576 ; Gobind v. Rung Lal 21 Cal. 23.

LECTURE IV. service of notice under O. 21, r. 22 C. P. C. Act V of 1908,¹⁹⁰ or to obtain copies of judgment and decree,¹⁹¹ or to obtain restitution under an appellate decree,¹⁹² or to issue a sale proclamation,¹⁹³ or to issue a sealed warrant by a Presidency Small Cause Court¹⁹⁴ or to have the property sold subject to mortgage,¹⁹⁵ or to have the heirs of the deceased judgment-debtor substituted,¹⁹⁶ or to transfer a decree for execution to another Court,¹⁹⁷ or to deliver possession to the decree-holder purchaser¹⁹⁸, is a step in aid of execution.

Steps not
in aid of execu-
tion.

An application by a decree-holder for leave to bid at the sale is not necessarily a step in aid of execution.¹⁹⁹ Any ministerial act which the Court does *suo motu* and not at the instance of the decree-holder upon any application is not a step in aid of execution.²⁰⁰ An application by a decree-holder who has purchased a property at the sale to confirm the sale,²⁰¹ or to return the copy of the decree which has been partially executed,²⁰² or to bring a decree into conformity with the judgment,²⁰³ or to release a portion of the

190. Narsingh Dayal v. Kali Charan

C. W. N. 415.

14 C. W. N. 486; 5 Ind. Cas. 147.

198. Prem v. Juramoni 13 C. W. N.

694; Moti Lal v. Makund Singh 19 All.

477; Sariatoollah v. Raj Kumar 27 Cal.

709; 4 C. W. N. 681; Lakshmanan v.

Kannammal 24 Mad. 185.

191. Haridas v. Vithaldas 36 Bom. 638.

199. Bansi v. Sikree Mal 13 All. 211;

Vinayakrao v. Vinayak Krishna 21 Bom.

331; Dalel Singh v. Umrao Singh 22

Ap. 399; Hira Lal v. Dwija Charan 10

C. W. N. 209; 3 C. L. J. 240; Toree

Mahomed v. Mahomed Mabood 9 Cal. 730;

13 C. L. R. 91; Raghubundun v. Kally Dut

23 Cal. 690; Troylokya v. Jyoti 30 Cal.

761; 8 C. W. N. 251; Nabadi v.

Bepin 12 C. W. N. 621.

200. Motendro v. Mohendro 10

C. L. R. 330; Rajkumar v. Rajlakhi

12 Cal. 441.

192. Umesh Chandra v. Shib Narain

31 Cal. 1011; 9 C. W. N. 193; Ram

Charan v. Nrisingha 11 C. L. J. 356.

201. Ananda Mohan v. Hara Sundari

23 Cal. 196; Rajaram v. Banaji 23 Bom.

311.

193. Kallu Rai v. Fahiman 13 All.

124; Daya Kishor v. Nanki Begam 20

All. 304; Kali Prosunno v. Lal Mohun

25 Cal. 258; 2 C. W. N. 219.

194. Jagannath v. Brojonath 29 Cal.

580.

195. Lalraddi v. Kala Chand 15 Cal.

363.

196. Adhar Chandra v. Lal Mohun

24 Cal. 778; 1 C. W. N. 676; Mahalinga

Moopanar v. Kuppanachariar 30

Mad. 541; 17 M. L. J. 485.

197. Rajbullabh v. Joy Kishen 20 Cal.

29; Latchman v. Maddan Mohun 6 Cal.

513; 7 C. L. R. 521; Collins v. Maula

Baksh 2 All. 284; Krishnayyar v. Ven-

kayyar 6 Mad. 81; Chundra Nath

v. Gurroo Prosunno 22 Cal. 375;

Roma Nath v. Gouri Sankar 2

property attached,²⁰⁴ or to be allowed to set off the purchase money against the decree instead of paying it into Court,²⁰⁵ or for execution against the surety for which he was not liable under the decree,²⁰⁶ or for time,²⁰⁷ or giving consent to the application by the judgment-debtors for postponement of sale,²⁰⁸ or resisting or opposing any such application by the judgment-debtor,²⁰⁹ or for payment of process-fee by decree-holder unaccompanied by any application to take some specific action,²¹⁰ or praying that the matters of an execution previously applied for might be disposed of along with another similar application,²¹¹ or to obtain a certificate under S. C. Act VII of 1889,²¹² or for an order permitting the decree-holder to withdraw money not realised in execution but deposited by the judgment-debtor,²¹³ is not a step in aid of execution. Nor, is a suit to establish the right to attach a portion of the property released from attachment a step in aid of execution against the portion not released.²¹⁴

204. Abdul Hossein v. Fazilun 20 Cal. 255 ; Troylokyka v. Jyoti 30 Cal. 761 ; 8 C. W. N. 251.

205. Ananda Mohan v. Hara Sundari 23 Cal. 196, distinguishing Radha Prosad v. Sundur Lall 9 Cal. 644.

206. Narayan Ganpatbhat v. Timmaya 31 Bom. 50 ; Kusaji v. Vinayak 23 Bom. 478.

207. Umed Ali v. Abdul Karim 35 35 Cal. 1060 ; 8 C. L. J. 193 ; Kartick Nath v. Juggernath 27 Cal. 285 ; Hira Lal v. Dwija Charan 10 C. W. N. 209 ; 3 C. L. J. 240.

208. Mainath v. Debi Bukhsh 3 All. 757 ; Fakir v. Ghulam 1 All. 580 ; Sreenivasa v. Ponnusawmy 28 Mad. 40 ; Barrow v. Javarchand 19 Mad. 67.

209. Akbar v. Kali Krishna 4 C. W. N. 151 ; Umesh v. Soonder Narain 16 Cal. 747 ; Shob Lal v. Radha Kishen 7 All. 898 ; Abdul Hossein v. Fazilun 20 Cal. 255 ; Troylokyka v. Jyoti 30 Cal. 761 ; 8 C. W. N. 251 ; Langtu Paude v. Baijnath 28 All. 387 ; Kristo Coomar v. Mahabat 5 Cal. 595.

210. Hem Chunder v. Brojo Soondury 8 Cal. 89 ; 10 C. L. R. 272 ; Toree Mahomed v. Mahomed Mabood 9 Cal.

730 ; 13 C. L. R. 91 ; Fazal Imam v. Metta Singh 10 Cal. 549 ; Gunga Pershad v. Debi Sundari 11 Cal. 227 ; Malukchand v. Becher Natha 25 Bom. 639 ; Sheo Prasad v. Indar Bahadur 30 All. 179 ; Thakur Ram v. Katwaru Ram 22 All. 358 ; Narendra v. Bhupendra 23 Cal. 374 ; Madau Mohan v. Gunga Chandra 17 C. L. J. 422 ; Dwarkanath v. Anandrao 20 Bom. 179 ; Trimbak v. Kashinath 22 Bom. 722 ; Aghore Kali v. Prosummo Coomar 22 Cal. 827 ; Radha Prosad v. Sundur Lall 9 Cal. 644.

211. Abdul Hekim v. Assentoollah 25 W. R. 94.

212. Murgeppa v. Basawantrao 37 Bom. 559.

213. Sadananda v. Kali Sankar 10 C. W. N. 28 ; 3 C. L. J. 95 ; Hem Chunder v. Brojo Soondury 8 Cal. 89 ; 10 C. L. R. 272 ; Fazal Imam v. Metta Singh 10 Cal. 549 ; Gunga Pershad v. Debi Sundari 11 Cal. 227 ; Ananda Mohan v. Hara Sundari 23 Cal. 196 ; Baij Nath v. Ghanshyam 8 C. W. N. 382 ; Appasami v. Jotha 22 Mad. 448.

214. Raghuandun v. Bhugoo Lall 17 Cal. 268.

LECTURE IV.

6. Date of issue of notice.

6. The date of issue of notice under O 21, r. 22 C. P. C. Act V of 1908 to the person against whom execution is applied for to show cause why the decree should not be executed against him. Time runs from the date when notice is actually issued and not from the date of the order of the Court to issue such notice.²¹⁵ Actual service of notice is not necessary.²¹⁶ Nor, is it material whether the notice ought or ought not to have been issued.²¹⁷

7. Date when payment is to be made.

7. The date at which the decree or order directs any payment to be made.

Where a decree provides that on failure of one instalment, the whole decree shall become payable, execution must be applied for within three years from the date on which the first unpaid balance becomes due and the acceptance of subsequent instalment will not extend the time.²¹⁸ But where the decree only gives the decree-holder the option to execute the whole decree on the failure of one or more instalments, his omission to apply for execution within three years of the non-payment of such instalment will only affect his right to recover that instalment and the whole amount of the decree at once but will not affect his right to recover subsequent instalments.²¹⁹ Where there were subsequent payment and acceptance of instalments the parties may be precluded from asserting their respective rights.²²⁰

Where a decree directs payment to be made annually, it is not a decree directing payment of money to be made at a "certain

215. Ratan Chand v. Deb Nath 10 C. W. N. 303 ; 4 C. L. J. 530 ; Kadaresur v. Mohim Chandra 6 C. W. N. 656 ; Hari Ganesh v. Yamunabai 23 Bom. 35 ; Cheruvath v. Nerath 30 Mad. 30 ; see *contra* Damodar v. Sonaji 27 Bom. 622 ; Govind v. Dada 28 Bom. 416 ; Jumai v. Abdul Karim 30 All. 536.

216. Damodar v. Sonaji 27 Bom. 622.

217. Dhonkal v. Phakkar 15 All. 84 (F. B.) ; Behari Lal v. Salik Ram 1 All. 676 ; Gopal Chunder v. Gosain Das 25 Cal. 591 ; 2 C. W. N. 556.

218. Dulsook v. Chugon 2 Bom. 356 ; Sakhararam v. Ganesh 3 Bom. 193 ; Shib Dat v. Kalka Prasad 2 All. 143 ; Stowell v. Billings 1 All. 350 , Ugrah

Nath v. Lagannam 4 All. 83 ; Zahur Khan v. Bakhtawar 7 All. 327 ; Shankar v. Jalpa 16 All. 371 ; Janki v. Ghulam Ali 5 All. 201 ; Mon Mohun v. Durga Churn 15 Cal. 502 ; Bir Narain v. Darpa Narain 20 Cal. 74 ; Hurri Pershad v. Nasib Singh 21 Cal. 542 ; Bhola and v. Padmanand 6 C. W. N. 348 ; Sitab Chand v. Hyder Malla 21 Cal. 281 ; 1 C. W. N. 229.

219. Asmutullah v. Kally Churn 7 Cal. 56 ; Radha Prasad v. Bhagwan Rai 5 All. 289 ; Nil Madhub v. Ramsodoy 9 Cal. 857.

220. Kashiram v. Pandu 27 Bom. 1 (F. B.) ; Upendra v. Takalia 2 B. L. R. A.C. 345 ; Krishna v. Omud Ali 6 B.I.R. App. 31 ; Juhlistir v. Nobin 13 Cal. 73.

date,"²²¹ unless it can be gathered from the decree that payments are directed to be made on dates or periods which are clearly indicated by the terms of the decree.²²² Where there is no direction to pay future maintenance but only a direction that the plaintiff is entitled to maintenance at a certain rate, that is not a decree payable by instalments.²²³ The limitation of three years will be counted from the date of the decree and not from the date of the order for payment of the balance of the decretal amount under a mortgage decree.²²⁴

Fraud or force on the part of a judgment-debtor gives a new starting point.²²⁵ The word "fraud" is to be interpreted in a wider sense than that in which it is generally used in the English law.²²⁶ Thus, locking up the house to prevent attachment of moveables,²²⁷ evading process by contrivance or dishonesty,²²⁸ a fictitious transfer of property to defeat or delay execution,²²⁹ pressing an application to set aside an *ex parte* decree with the sole object of delaying the execution proceedings²³⁰ is "fraud."

A person under disability, such as a minor, an insane, or an idiot, may make an application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor.²³¹ But when once the time has commenced to run, subsequent disability will not stop it.²³² Where a Receiver has been appointed in execution, the attachment still continuing, the execution proceedings continue so long as the appointment of the Receiver continues, although the execution case is struck

Extension of time.

i. Fraud or force.

ii. Disability.

221. Yusuf Khan v. Sirdar Khan 7 Mad. 83; Sabhamatha v. Subba 7 Mad. 80.

sami 6 Mad. 365; Mohsin Ali v. Masum Ali 34 All. 20.

222. Bhagu Jetha v. Malek Bawasahel 9 Bom. 318; Venkayya v. Raghuva 22 Mad. 320.

223. Pattakara v. Rungasami 6 Mad. 365.

224. Visalatchi v. Sivasankara 4 Mad. 292.

225. Sham Kissen v. Damar Kumari 11 C. W. N. 440.

226. S. 6 Limitation Act IX of 1908.

227. S. 9 Limitation Act IX of 1908; Jivraj v. Babaji 29 Bom. 68, distinguishing Lolit Mohun v. Janoky Nath

29 Cal. 714, where the first application was made by the minor himself: Bhagat Bihari v. Ram Nath 27 All

179; Vishnu v. Manjanma 9 Bom. 108.

228. O. 34 r. 6 C. P. C. Act V. of 1908; Madan Mohan v. Nobin Kishore 3 C. L. J. 291.

229. S. 18 Limitation Act IX of 1908; see Venkayya v. Raghuva 22 Mad. 320.

230. Raghunath v. Kasi Prosad 15 C. L. J. 678; Pattakara v. Ranga-

LECTURE IV. off.²³³ Where execution is stayed by an agreement certified to the Court that the decretal amount should be paid by instalment, limitation will not run until default is made.²³⁴

In computing the period of limitation prescribed by I. L. Act IX of 1908, or S. 48, C. P. C. Act V of 1908 for any application for the execution of a decree against the ward of Court, proceedings in which have been stayed, or temporarily barred under S. 21 Act IV (U. P. C.) of 1912 or S. 17 Act I (B. C.) of 1905, the time from the date of notice or of the decree to the date of the Collector's decision confirmed by the Court of Wards or to the date of due submission of claim shall be excluded.²³⁵

The time taken in prosecuting another civil proceeding against the same party for the same relief in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it is also excluded.²³⁶

The time of the continuance of an injunction or order restraining the decree-holder from executing the decree shall be excluded, even when the objection was against the attachment and sale of some particular property and the decree-holder might have proceeded against other property.²³⁷ Time begins to run against the decree-holder when the bar to execution imposed by injunction is removed in favour of the decree-holder²³⁸ But if limitation had once begun to run, the subsequent stay of execution would not affect it.²³⁹

An acknowledgment of liability in writing made before the expiration of the period prescribed for an application for execution to pay the decretal amount gives a new starting point for such

iii. Acknowledgment.

204 ; Sri Ram v. Het Ram 29 All. 279 ; Zamir Hasan v. Sundar 22 All. 199 ;

Abdul Latif v. Rajani Mohun 11 C.W.N. 831 ; Sheikh Jania v. Lal Bibi 7 C. L. J. 308 ; Surja Kumar v. Arun Chunder 28 Cal. 465 ; 5 C. W. N. 767.

233. Radha Kishore v. Aftab 7 Cal. 61.

234. Sham Karan v. Piari 5 All. 596.

235. S. 21 Act IV (U. P. C.) of 1912 ; S. 17 Act I (B. C.) of 1905.

236. S. 14 (2) Limitation Act IX of 1908 ; Rajbullubh v. Joy Kishen 20 Cal.

29 ; Navalchand v. Amichand 18 Bom. 734.

237. S. 15 (1) Limitation Act IX of 1908 ; Ghulam Nasir-ud-din v. Hardeo Prasad 34 All. 436 ; Bihari Lal v. Jagarnath 28 All. 651.

238. Desraj Singh v. Karam Khan 19 All. 71 ; Ruddar Singh v. Dhanpal Singh 26 All. 156 ; Beni Prasad v. Sarju Prasad 26 All. 110.

239. Rungiah v. Nanjappa 26 Mad. 780 ; Rajarathnam v. Shevalayammal 11 Mad. 103.

application.²⁴⁰ The acknowledgment need not be express, nor made by the judgment-debtor, nor made to the decree-holder himself. Thus, an application for postponement of sale in execution of a decree,²⁴¹ or an application signed by the judgment-debtor's pleader praying for time to pay off the decretal amount,²⁴² or an application in which the judgment-debtor agrees to pay the decretal amount to the attaching creditor of the decree-holder,²⁴³ or the specification of the judgment-debt in a petition of insolvency,²⁴⁴ is an acknowledgment of liability. An acknowledgment made even to one of the decree-holders gives a fresh starting point.²⁴⁵ But it does not alter the character of the debt.²⁴⁶

An acknowledgment of a judgment-debt by one of several judgment-debtors does not keep alive the decree against the others.²⁴⁷ Where a decree is partly in favour of the plaintiff and partly in favour of the defendant, an application for execution by one party does not operate as an acknowledgment.²⁴⁸

Where interest or part of the money payable under a decree or order of Court is before the expiration of the prescribed period of limitation paid by the judgment-debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.²⁴⁹

The law of limitation should not be strained in favour of the

iv. Payment
of principal or
interest.

240. S. 19 (1) Limitation Act IX of 1908; see Tarsi Ram v. Man Singh 8 All. 492.

241. Ramhit v. Satgur 3 All. 247 (F. B.)

242. S. 19 Exp. II Limitation Act IX of 1908. See Rau Coomar v. Jakur Ali 8 Cal. 716; 10 C. L. R. 613; Toree Mahomed v. Mahomed Mahbood 9 Cal. 730; 13 C. L. R. 91; Narendra v. Bhupendra 23 Cal. 374; Trimbak v. Kashinath 22 Bom. 722; Dharma v. Gobind 8 Bom. 99; Muhammad v. Payag 16 All. 228; Srinivas v. Narhar 32 Bom. 108; 10 Bom. L. R. 374; Venkatray v. Bijesing 10 Bom. 108; Bindeswari v. Awadh Behari 15 C. W. N. 82.

243. Brojo Nath v. Gaya Sundari 6 C. L. J. 141; Peary Mohun v. Romesh Chunder 15 Cal. 371.

244. Rampal v. Nand Lal 16 C. W. N. 346.

245. Ilarihar v. Gumendar 9 C. W. N. 1025; Rakhal Chandra v. Hemangini 3 C. L. J. 347; Rani Coomar v. Jakur Ali 8 Cal. 716; 10 C. L. R. 613; Kamal Krishna v. Kedar Nath 10 C. L. J. 517.

246. Kamal Krishna v. Kedar Nath 10 C. L. J. 517; Rauchandra v. Vellyanadan 18 I. A. 37; 14 Mad. 258.

247. Chandra Kumar v. Ranidin Podder 16 C. W. N. 493.

248. Juddi v. Ramrao 22 Bom. 998.

249. S. 20 Limitation Act IX of 1908. The provision sets at rest the conflict of decisions between the High Courts of Madras and Calcutta on the one hand and those of Allahabad and Bombay on the other; see Periasami v. Krishna 25 Mad. 431; Kuppuswami v. Rungasamy

LECTURE IV

Successive applications allowed, unless barred by *res judicata*.

judgment-debtor who has not paid his just debt.²⁵⁰ But an application for execution presented beyond the period of limitation shall be dismissed, although limitation has not been set up as a defence.²⁵¹ But this rule does not require a Court to ascertain whether all the prior applications previously adjudicated on were made in time.²⁵²

An execution is an entire thing. If a plaintiff in a judgment issues an execution and claims an amount less than the whole sum to which he is entitled to be levied, he cannot subsequently issue another execution for the balance, for the defendant should not be harassed by repeated executions.²⁵³ But a decree-holder is entitled to present in succession, though a previous application has been dismissed for default, any number of applications for execution of the same decree.²⁵⁴ An application for execution however may be barred by general principles analogous to the principles of *res judicata*.²⁵⁵ Thus, where the matters directly and substantially in issue in both the applications are the same, either actually,²⁵⁶ or constructively,²⁵⁷ the parties in the two proceedings are the same,²⁵⁸ litigating under the same title,²⁵⁹ the former application was heard and finally

27 Mad. 608; Sreenivasa v. Ponnuswamy

28 Mad. 40; Kader Buksh v. Gour

6 C. W. N. 766; Mungol v. Shama 4

Cal. 708; Roshan v. Mata 26 All. 36;

Janki v. Ghulam 5 All. 201; Raunhit

v. Satgur 3 All. 217; Muhammad

v. Payag 16 All. 228; Ahsanullah

v. Dakkhini 27 All. 575; Purmanandas

v. Vallabdas 11 Bom. 506; Shripatrv

v. Govind 14 Bom. 399.

250. Adhar Chandra v. Lal Mohun

24 Cal. 778; 1 C. W. N. 676; Manorath

v. Ambika 13 C.W.N. 533; 9 C.L.J. 143.

251. S. 3 Limitation Act IX of

1908; S. 184 (1) B. T. Act VIII of 1885;

see Ramu Rai v. Dayal Singh 16 All.

390; Abdullah v. Asraf Ali 7 C. L. J. 152.

252. Mungul Pershad v. Grijakant

8 I. A. 123; 8 Cal. 51; 11 C. L. R. 113.

253. Freeman on Executions §53.

254. Asim Mandal v. Raj Mohan 13

C. L. J. 532; Thakur Prasad v. Fakir-

ullah 22 I. A. 41; 17 All. 196; Tirtheswari v. Annappayya 18 Mad. 131;

Dhonkal v. Phukkar 15 All. 84; Hajrat

v. Valiulnessa 15 Bom. 129.

255. Mungul Pershad v. Grijakant

8 I. A. 123; 8 Cal. 51; 11 C. L. R.

113; Ram Kirpal v. Rup Kuari 11 I. A.

37; 6 All. 269; Beni Ram v. Nanhu

Mal 11 I. A. 181; 7 All. 102.

256. Dinkar v. Hari 14 Bom. 206;

Gouri Sunkur v. Abhoyeswari 25 Cal. 262.

257. Mungul Pershad v. Grijakant 8

I. A. 123; 8 Cal. 51; 11 C. L. R.

113; Sheoraj v. Kameshar 21 All. 282;

Lakshmanan v. Kuttyan 21 Mad. 669;

Co entry v. Tulshi Pershad 31 Cal. 822;

8 C. W. N. 672; Nanda Rai v. Raghu-

mandan 7 All. 282; Sher Singh v. Daya

Ram 13 All. 564; Thakur Barham v.

Ananta Ram 2 C. L. J. 584.

258. Gnanambal v. Parvathi 15 Mad.

477.

259. Gourmoni v. Jugut 17 Cal. 57;

Bisessur v. Mahtab 10 W. R. (E. B.)

8; B. L. R. Sup. 967; Bhola Nath v.

Prafulla 28 Cal. 122; 5 C. W. N. 80;

Tileswar v. Parbati 15 All. 198; Hira

Lall v. Dwija Charan 10 C. W. N. 209;

3 C. L. J. 210; Umed Ali v. Abdul Karim

35 Cal. 105; 8 C. L. J. 193; Nepul

decided and not dismissed for default,²⁶⁰ the decision must have been necessary to the determination of the previous application,²⁶¹ a fresh application is barred. Where a relief is claimed but is not expressly granted, it will be deemed to have been refused.²⁶² Where the former application was rejected on the ground that it was time-barred, a subsequent application is barred.²⁶³ But when a decision is erroneous in law, it cannot have the force of *res judicata*.²⁶⁴

The enquiry is limited to the immediately preceding application and not a roving examination into all the previous applications.²⁶⁵ But the principle of *res judicata* has no application where the judgment-debtor had no notice of the proceedings, or the notice being defective, the judgment-debtor had no opportunity to contest their validity,²⁶⁶ nor where different applications are made for execution of different decrees.²⁶⁷ The fact that the case was struck off does not entitle either party to reopen the question previously adjudicated.²⁶⁸ Nor, can a decree-holder, as a matter of right, discontinue the execution proceedings at any stage at his option.²⁶⁹

A time limit is, however, placed upon successive applications.²⁷⁰

Time limit.

- Chandra v. Amrita Lal 26 Cal. 888 ;
Dalichand v. Bai Shivkar 15 Bom. 242 ;
Khosal v. Ukiladdi 14 C. W. N. 111 ;
Balmukund v. Ashfaq Husain 31 All. 518.
260. D. & L. Bank v. Orchard 4 I. A. 127 ; 3 Cal. 47 ; Unnoda Pershad v. Koopan 3 Cal. 518 ; 1 C. L. R. 408 ; Gourmoni v. Jugut 17 Cal. 57 ; Hari v. Yamunabai 23 Bom. 35 ; Kishore v. Dwarkanath 21 I. A. 89 ; 21 Cal. 781 ; Budan v. Ramchandra 11 Bom. 537 ; Prabhacara Row v. Potannah 2 Mad. 1 ; Narayana v. Gopala Krishna 28 Mad. 355 ; Kashinath v. Ramchandra 7 Bom. 108.

261. Bhola Nath v. Prafulla 28 Cal. 122 ; 5 C. W. N. 80.

262. Nityananda v. Gajapati 24 Mad. 681.

263. Bandey v. Romesh 9 Cal. 65 ; 11 C. L. R. 145 ; Manjunath v. Venkatesh 6 Bom. 54.

264. Baij Nath v. Padmanand Singh 39 Cal. 818 ; 16 C. W. N. 621 ; 16 C. L. J. 154.

265. Mungul Pershad v. Grijal Kant 8 I. A. 123 ; 8 Cal. 51 ; 11 C. L. R. 113 ; Nepal Chandra v. Amita Lal 26 Cal. 888.

266. Ram Kirpal v. Rup Kuari 11 I. A. 37 ; 6 All. 269 ; Beni Ram v. Nanhu Mal 11 I. A. 181 ; 7 All. 102 ; Narayana v. Gopala Krishna 28 Mad. 355 ; Rama-sami v. Ramasami 30 Mad. 255 ; Maazzam Hussen v. Sarat Coomary 14 C.W.N. 133 ; 11 C. L. J. 357 ; Sreepati v. Shamakdhone 15 C. L. J. 123 ; Harendra Lal v. Sham Lal 27 Cal. 210 ; Mon Mohan v. Dwarka Nath 12 C. L. J. 312 ; Mochai Mandla v. Meseruddin 13 C. L. J. 26 ; Budan v. Ramchandra 11 Bom. 537 ; Murlidhar v. Narsingh 17 C. W. N. 113 ; 15 C. L. J. 453 ; Narendra v. Bhupendra 23 Cal. 374.

267. Nanda Kumar v. Gobinda Mohan 13 C. L. J. 312

268. Murlidhar v. Narsingh 17 C. W. N. 113 ; 15 C. L. J. 453.

269. Kenarani v. Kailas Chandra 18 C. L. J. 53.

270. Kunhi v. Seshagiri 5 Mad. 111.

LECTURE IV.

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So, when an application to execute a decree, other than that of a chartered High Court has been made, no order shall be made for execution of the same decree, upon a fresh application, if presented after the expiration of twelve years (1) from the date of the decree or (2) from the date fixed by the decreee for the payment of money decreed, unless the judgment-debtor has by fraud or force prevented the execution of the decree at some time within the period immediately before the date of the application.²⁷¹ Limitation does not run until the decreee is ripe for execution.²⁷² But once limitation has begun to run, the twelve years' period must be computed from that date.²⁷³ The order on the fresh application may be made after the expiration of twelve years, if the application was presented within the period.²⁷⁴

The application must be a substantive application and not merely an ancillary application made with the object of moving the Court to proceed with the substantive application already filed.²⁷⁵ Thus, an application for sale of the property already attached,²⁷⁶ or for transfer of a decree to another Court for execution,²⁷⁷ or for execution when a sale is set aside,²⁷⁸ or for execution after the removal of the obstacle which for a time rendered execution impossible,²⁷⁹

271. S. 48 C. P. C. Act V of 1908 ; Art. 181 Limitation Act IX of 1908. See Mayabhai v. Tribhuvandas 6 Bom. 258 ; Ganapathi v. Balasundara 7 Mad. 540 ; Futtah Narain v. Chundrabati 20 Cal. 551 ; Jogendra v. Shyam Das 36 Cal. 543 ; 9 C. L. J. 271 ; Sham Kissen v. Damer Kumari 11 C. W. N. 440.

272. Narhar Raghunath v. Krishnaji Govind 36 Bom. 368.

273. Bhagwant Ramchandra v. Mahamad Rukmodi 36 Bom. 498.

274. Senra Disai v. Amapani 6 Mad. 359 ; Rahim Ali v. Phul Chand 18 All. 482 (F. B.) ; Dewan Ali v. Sorosibala 8 Cal. 297 ; 10 C. L. R. 111 ; Chengaya v. Appasami 6 Mad. 172. The words "and granted" in S. 230 C. P. C. Act XIV of 1882 have been omitted. See Tilesar v. Parbati 15 All. 198 ; Nilmony v. Biressur 16 Cal. 744.

275. Rahim Ali v. Phul Chand 18 All. 482 ; Panaul v. Kishen Mun 9 C. L. R. 297 ; Ji Mall v. Jwala Prosad 121 All. 155

276. Paroosh Ram v. Kali Puddo 17 Cal. 53 ; Joobraj & Buhoria 7 C. L. R. 424 ; Panaul v. Kishen Mun 9 C. L. R. 297.

277. Nilmony v. Biressur 16 Cal. 744 ; Sundar Singh v. Doru Shankar 20 All. 78.

278. Ramineedi v. Lekkoju 30 Mad. 209 ; Panaul v. Kishen Mun 9 C. L. R. 297 ; Issuree v. Abdool 4 Cal. 415 ; 3 C. L. R. 46 ; Abdul Khayar v. Reajuddin Ahmed 13 C. W. N. 521 ; Biharilal v. Jagarnath 28 All. 651.

279. Kalyanbhai v. Ghanashamlal 5 Bom. 29 ; Hurronath v. Chunni Lall 1 Cal. 877 ; 3 C. L. R. 161 ; Paras Ram v. Gardner 1 All. 355 ; Kamarlal v. Jawahir 32 I.A. 102 ; 27 All. 331 ; 1 C. L. J. 381 ; Chintaman v. Balshastri 16 Bom. 294 ; Narayan Govind v. Sono Sudashiv 24 Bom. 345 ; Thakur Prasad v. Abdul Hasan 23 All. 13 ; Raghubans Gir v. Sheosaram 5 All. 213 ; Basant Lal v. Batul Bibi 6 All. 23 ; Balkanta Nath v. Aghore Nath 21 C. d. 387 ; Gurudeo Narayan v. Amri

is not a fresh application for execution, but one for continuance of the proceedings under the former one. But where execution was suspended at the instance of a successful claimant to the attached property, a subsequent application for execution is not one in continuation of the previous application.²⁸⁰

An application for execution is not a revival of a former one, when the former one was an application for execution against the property and the latter against the person of the judgment-debtor.²⁸¹ Nor, is it a revival when the application is that certain property already attached should be released and other property attached in its stead,²⁸² or that other additional property should be attached.²⁸³ An application to revive the previous application is governed by Art. 181 Sch. I Limitation Act IX of 1908.²⁸⁴ If the delay has been occasioned by obstacles for which the decree-holder cannot be responsible, the application otherwise time barred may be treated as one for revival and continuation of the earlier proceedings, even if fraud on the part of the judgment-debtor is not established.²⁸⁵

Narayan 33 Cal. 689; Madhababmoni v. Pamela Lambert 12 C. L. J. 328; Chandra Prodhan v. Gopi Mohan 14 Cal. 385; Buti Begam v. Nihal Chand 5 All. 159; Lakhni Chand v. Bilmam Das 17 All. 425; Raghunath v. Lalji Singh 23 Cal. 397; Rudra Narain v. Pachu 23 Cal. 437; Sasivarna v. Arulanandam 21 Mad. 261; Ruddur Singh v. Dhanpal Singh 26 All. 156; Rahim Ali v. Phulchand 18 All. 482. (F. B.)

280. Kedar Nath v. Prolyat Coomur 14 C. L. J. 610; Raghuendrum v. Bhungoo Lall 17 Cal. 268; Shrivaram v. Sarasvatibai 20 Bom. 175.

281. Krishnaji v. Anandray 7 Bom. 293; Virasami v. Athi 7 Mad. 595; Har Sarup v. Bal Golind 18 All. 9.

282. Sreenath v. Yussof Khan 7 Cal. 556; 9 C. L. R. 334.

283. Ramsoondher v. Gopessur 3 Cal. 716; 2 C. L. R. 220.

284. Bihari Lal v. Jagarnath 28 All. 651; Kamrudin v. Jawahir 32 I. A. 102; 27 All. 331; 1 C. L. J. 381; Suppa Reddiar v. Ayndai Annal 28 Mad. 50 (F. B.); Chalavadi v. Poloori 31 Mad. 71.

285. Rameswar v. Rateshwari 17 C. L. J. 125.

LECTURE V.

Compulsory Sales in execution of decrees for money.

(Attachment and Stay of sale.)

Application
for execution
of a decree by
sale.

The application for execution of a decree by attachment and sale of the judgment-debtor's property shall be in writing, signed and verified by the applicant or some person proved to be acquainted with the facts of the case.¹ The verification may be made by a person having a general power-of-attorney from the decree-holder, though the latter may be residing within the jurisdiction of the Court.² The decree-holder need not file with his application a copy of the decree for which execution is applied for.³ A fraudulent execution of a decree or order against any person after it has been satisfied is punishable under S. 210 I.P.C. But a mere application not followed by execution does not constitute any offence.⁴

i. Crops and
moveables.

An application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.⁵ An application for attachment of the judgment-debtor's moveable property not in his possession shall contain an inventory of the property containing an accurate description of the same.⁶

ii. Immove-
able property.

An application for the attachment of the judgment-debtor's immoveable property shall contain a description, sufficient to identify and a specification of boundaries or a number in a record of Settlement or Survey by which the property can be identified⁷ and also a specification of the judgment-debtor's share or interest in such property to the best of the information and belief of the applicant.⁸ The court may require the applicant to produce a

-
1. O. 21, r. 11 C. P. C. Act V of 1908.
 2. Bakar v. Udit Narain 26 All. 151.
 3. O. 21, r. 11 (3) C. P. C. Act V 1908; Modhoo Dossia v. Nobin Chunder 16 W. R. 25; Rajkumar v. Rajlakhi 12 Cal. 111; Rajaram v. Banaji Mairal 23 Bom. 331; Raj Gir v. Iswardhari 11 C.L.L.J. 243; 5 Ind. Cas. 660; Raghubari Doyal v. Jadunundan 16 C. W. N. 736.
 4. Shama Charan v. Kasi Naik 23 Cal. 971.
 5. O. 21, r. 15 (1) C. P. C. Act V

-
- 1908.
 6. O. 21, r. 12 C. P. C. Act V of 1908.
 7. O. 21, r. 13 C. P. C. Act V of 1908; Lack Ram v. Mohesh Dass 12 W. R. 188; Mahtab Chund v. Burudanath 18 W. R. 111; Hurry Churn v. Subaydar 12 Cal. 161; Wajihur v. Bishwanath 18 Cal. 462; Mac Gregor v. Tarini Churn 11 Cal. 121.
 8. O. 21, r. 13 C. P. C. Act V of 1908; Muhammad v. Dipchand 11 All. 199; Adesh Narayanji v. Muse Natha 1 Bom. 601.

certified extract from the Register of the office of the Collector, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land and the shares of the registered proprietors.⁹

The Court may orally examine the judgment-debtor or any other person *e.g.*, a garnishee debtor as to the means or property which the judgment-debtor has of satisfying the decree.¹⁰ The examination is not only intended to be an examination but to be a cross-examination and that of the severest kind and is not confined to answering the simple question what debts are owing but the debtor must answer all questions fairly pertinent and properly asked with a view to ascertaining what debts are owing to him and from whom they are due and must give all necessary particulars to enable the plaintiff to recover under a garnishee order.¹¹ To apply to such examination the strict technical rules governing the examination of a witness on the trial of a cause or even the less strict rules applicable to cross-examination which it more nearly resembles, would be to impair greatly the efficiency and usefulness of the remedy intended to be given by the proceeding and in many cases to destroy it entirely.¹² The garnishee, if summoned, may defend himself to the same extent, as if he were sued for such property by the defendant. He may plead that the property is not subject to execution.¹³ No offset can as a general rule be available to the garnishee, unless at the moment when he is served with the notice such offset could have been asserted as a cause of action against the defendant.¹⁴ The judge may punish any party or witness for disobedience to any order of the court.¹⁵

When applications are made for the execution of cross-decrees in separate suits for the payment of two sums of money, passed between the same parties including decrees for enforcement of a mortgage or charge (the decree-holder in one of the suits being the judgment-debtor in the other and each party fills the same character in both suits) and capable of execution at the same time by the same Court, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller

Garnishee
may be ex-
amined.

Cross decrees.

9. O. 21 r. 14 C. P. C. Act V of 1908.

12. Freeman on Executions § 101.

10. O. 21, r. 41 C. P. C. Act V of 1908.

13. Freeman on Executions § 116.

11. Republic of Costa Rica v. Strongberg (1881) 16 Ch. D. 8; 59 L. J., Ch. 7.

14. Freeman on Executions § 117.

15. Freeman on Executions § 121.

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sum.¹⁶ The decree for the smaller amount cannot be executed at all.¹⁷ But, if either decree-holder omits to apply for execution of his decree, the other decree-holder may take out execution of his decree for its full amount.¹⁸

When either party is an assignee of one of the decreees, the rule equally applies, whether the judgment-debt is due by the original assignor or by the assignee himself.¹⁹ The holder of a decree passed jointly and severally against several judgment-debtors, one of whom holds a decree passed against such decree-holders singly, may treat his joint decree as a cross-decree.²⁰ Where under the decree both parties are entitled to recover sums of money from each other, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum.²¹ The remedy of each party against the other need not be precisely of the same nature. Thus, one may be entitled to recover the money by sale of the mortgaged property and the other entitled to recover it personally.²²

Order for
sale.

When an application for execution complies with the requirements of O. 21 r.r. 11-14 C.P.C. Act V of 1908 or is amended within the time fixed by the Court, the Court may issue execution of the decree by attachment and sale of any property of the judgment-debtor, provided the value of the property to be attached shall, as nearly as may be, correspond with the amount due under the decree.²³ Where permission was obtained for filing a list of immoveable properties but no time was fixed and the list was not filed after the period of limitation, the proceedings in execution were held barred.²⁴ An execution from a Court having no authority to issue execution, or from a Court no longer in existence, or upon a void judgment, or a judgment never rendered, would undoubtedly be void. The same may be affirmed of executions issued by some one having no authority to issue executions. Executions on satisfied judgments, or against

16. O. 21, r.r. 18 (1), 20 C. P. C. Act V of 1908.

9 Cal. 497; 13 C. L. R. 93; Ram Sukh v. Vota Ram 14 All. 339.

17. Simu v. Santhoji 26 Mad. 428.

21. O. 21, r.r. 19, 20 C. P. C. Act V of 1908; Bhagwan v. Ratan 16 All. 395.

18. Rewa Mahlon v. Ran Kishen 13 I. A. 106; 11 C. d. 18; Chajmal v. Lal Dham 21 All. 181; Pennisamy v. Doraisamy 32 Mad. 336.

22. Sankara v. Gopala 23 Mad. 121; Bhagwan v. Ratan 16 All. 395; Ishri v. Gopd 6 All. 351.

19. O. 21, r. 18 (2) C. P. C. Act V of 1908.

23. S. 51, O. 21, r. 17 C. P. C. Act V of 1908.

20. O. 21, r. 18 (1) C. P. C. Act V of 1908 see Hurry Doyal v. Din Doyal

24. Salimullah v. Simeidi 18 C. L. J. 538.

a defendant whose property cannot be taken in executions, or for or against a sole plaintiff or defendant who died prior to the teste of the writ when there has been no revivor, are according to a preponderance of the authorities void. But irregularities and errors in the rendition of a judgment, or in the proceedings leading thereto, unless such errors are jurisdictional or unless the judgment is utterly void, cannot be made grounds for quashing an execution upon the judgment. An execution will not be vacated on account of any defence which could have been made at the time of trial.²⁵

As it would be oppressive to carry on more than one execution of the same decree, the Court may in its discretion refuse execution at the same time against the person and property of the judgment-debtor.²⁶ An order refusing such execution is appealable.²⁷

Where at any stage of a suit the Court is satisfied that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him (*a*) is about to dispose of the whole or any part of his property, or (*b*) is about to remove it from the local limits of the jurisdiction of the Court, the Court may, upon his failure to furnish security sufficient to satisfy the decree, order his property, whether within or without the jurisdiction of the Court or not, sufficient to satisfy any decree which may be passed in the suit, to be attached.²⁸ Such attachment is merely a step for the purpose of preventing the debtor from delaying or obstructing an enforcement of the decree subsequently passed.²⁹ The Court may look to the conduct of the parties immediately before the suit and to examine the surrounding circumstances to see whether the defendant is about to dispose of his property and with what intention.³⁰ When a decree directs enquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may before the amount due from him has been ascertained be attached.³¹ But in

LECTURE V.

Simultaneous executions.

Attachment before judgment.

25. Freeman on Executions § 73.

26. O. 21, r. 21 C. P. C. Act V of 1908.

27. S. 47 C. P. C. Act V of 1908;

28. O. 38, r.r. 5, 6, C. P. C. Act V of 1908.

29. Jogendra Nath v. Monmootho Nath 17 C. W. N. 80; 16 C. L. J. 565. The words "within the jurisdiction of the Court" in S. 183 Act xiv of 1882, have

been omitted; see Krishnasami v. Engel 8 Mad. 20; Raja v. Janki Bai 5 Bom. L. R. 570; Ram Pertab v. Madho Rai 7 C. W. N. 216; Amara v. Annamala 31 Mad. 502.

30. MacGregor v. Cawnpore Sugar Works 11 C. L. J. 19.

31. O. 21, r. 42 C. P. C. Act V of 1908.

LECTURE V.

a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity, his property shall not be liable to attachment, otherwise than in execution of a decree.³²

Precept

The Court may also, where there is ground to apprehend that the decree-holder may otherwise be deprived of the fruits of his decree, issue a precept to any other Court, which would be competent to execute such decree, to attach any property belonging to the judgment-debtor and specified in the precept. But such attachment shall not continue for more than two months, unless the period has been extended by an order of the Court issuing the precept, or unless before the determination of such attachment, the decree has been transferred to that Court and the decree-holder has applied for the sale of such property.³³

Property liable to attachment, judgment-debtor having a disposing power.

All saleable property, moveable or immoveable, subject to certain exceptions noted below, belonging to the judgment-debtor or over which or the profits of which he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor, or by another person in trust for him or on his behalf, is liable to attachment and sale in execution of a decree.³⁴ Thus, the right of a mortgagor in the mortgaged property even after a decree has been obtained by the mortgagee,³⁵ the right to claim specific performance of a contract to sell land,³⁶ a parcel of land not being an aliquot part or share but being a portion of the land composing a putni,³⁷ the right of a proprietor of a revenue-paying estate after default has been made in the payment of revenue but before the sale is held under B. L. R. S. Act XI of 1859,³⁸ the share of a partner in a partnership business,³⁹ a lease prohibiting the lessee from alienating the land,⁴⁰ a life interest in a trust fund,⁴¹ a vested remainder⁴² money or other valuable

32. S. 81, O. 27, r. 8 C. P. C. Act V of 1908.

33. S. 16, C. P. C. Act V of 1908.

34. S. 60 C. P. C. Act V of 1908.

35. Protap Chunder v. Panioty 9 Cal. 504 : 12 C.L.R. 488 ; Sant Lal v. Ramji 9 All. 167 ; Parashram v. Govind 21 Bom. 226.

36. Rudra v. Krishna 14 Cal. 241 ; see *contra* Karalia v. Mansukhram 21 Bom. 400, explained in Lalchand v. Lakshman 22 Bom. 466.

37. Madhub v. Doyal 25 Cal. 415 ; 2 C. W. N. 108.

38. Hari Charan v. Haridas 2 C. L. J. 506.

39. Jagat Chunder v. Iswar Chunder 20 Cal. 693.

40. Golak Nath v. Mathura Nath 20 Cal. 273.

41. Abdul Lateef v. Doutre 12 Mad. 250.

42. Annaji v. Chandrabai 17 Bom. 503.

securities deposited as security for the due performance of duty by a servant with his master,⁴³ the rents and profits of a ghatwali tenure in the life time of the ghatwal,⁴⁴ are liable to attachment. An addressee of a cover containing currency notes sent through the Post Office for delivery to him has a disposing power over it, for "when once the letter has been posted, the property in it becomes vested in the addressee."⁴⁵ A policy of insurance effected by a judgment-debtor on his own life for the benefit of his wife is attachable, unless and until he divests himself of his beneficial interest in it by assignment in writing.⁴⁶

But property which is not transferable without the landlord's consent,⁴⁷ land assigned to a Hindu widow for her maintenance with a proviso against alienation,⁴⁸ a religious office,⁴⁹ the right of managing a temple or officiating at the worship connected with it and of receiving the offerings at the shrine,⁵⁰ the right to officiate at funeral ceremonies,⁵¹ the right of a Hindu widow to reside in her husband's family house,⁵² the income of property subject to a restraint upon anticipation accruing due after the date of the decree passed under S. 8 of M.W.P. Act III of 1874,⁵³ an unascertained right in an unascertained property⁵⁴ cannot be attached. A bonus sanctioned by a Railway Company to their servant being virtually a gift, the latter has no disposing power over the money until the gift is completed under S. 123 T.P. Act IV of 1882 by a registered instrument or actual payment.⁵⁵ An auctioneer has no disposing

Property
not liable
to attachment
judgment-
debtor not
having a dis-
posing power.

43. Karuthan v. Subramanya 9 Mad. 203.

44. Keshabati v. Mohan Chandra 39 Cal. 1010; 16 C. W. N. 802.

45. Narasimhulu v. Adiappa 13 Mad. 212.

46. Shankar Vishvanath v. Umarbai 37 Bom. 471.

47. Kailash v. Hari Mohan 10 C. L. J. 110.

48. Diwali v. Apaji 10 Bom. 342; Gulab Kuar v. Bansidhar 15 All. 371; Bansidhar v. Gulab Kuar 16 All. 143.

49. Kuppa v. Dorasami 6 Mad. 76; Narasimma v. Amantha 1 Mad. 391; Rangasami v. Ranga 16 Mad. 146; Mancharam v. Pranhankar 6 Bom. 298.

50. Durga Bibi v. Chanchal 4 All. 81; Rama Varma v. Ramu Nayar 5 Mad. 80; Vurmah Valia v. Ravi Vurmah 1 I. A. 76; 1 Mad. 235; Guanasambanda v. Velu Pandaram 27 I. A. 69; 23 Mad. 271; 1 C.W.N. 329; Malika v. Ratanmoni 1 C. W. N. 193; Shoiljanual v. Peary 29 Cal. 170; 6 C. W. N. 728.

51. Jhummuun v. Dinonath 16 W. R. 171.

52. Salakshi v. Lakshmayee 31 Mad. 590.

53. Goudoin v. Venkatesa 30 Mad. 378.

54. Tokai v. Davod 6 Moo. 510; 4 W. R. P. C. 87.

55. Janki Das v. E. I. R. Co. 6 All. 634.

LECTURE V.

Settled and
encumbered
estates.

Temple prop-
erty.

Fixtures.

Property in
the hands of
executor, ad-
ministrator
trustee &c.

power over the whole of the sale proceeds of goods sold by him as such but only over the portion which represents his commission.⁵⁶

In Bengal, no settled estate or part thereof shall during the life of a tenant for life be attached and sold in execution of a decree.⁵⁷ In Chotanagpur, when an encumbered estate has vested in an officer appointed by the Commissioner, all executions and attachments shall become null and void and so long as the management continues such estate shall be exempt from attachment or sale under process of any Civil Court in British India or any Revenue Court in Bengal in respect of any debts and liabilities.⁵⁸

Although the property of a temple cannot be sold away from the temple, the right, title and interest of a servant of a temple in land belonging to the temple which he holds as remuneration for his service until death or removal from office can be attached and sold.⁵⁹ If a chattel is so physically incorporated in, and made a part of, the property that it cannot be detached or removed without substantial destruction of such property or of some structure which is confessedly a part thereof, then such chattel has become an immoveable fixture. Thus, the doors and windows of a building cannot separately be attached.⁶⁰

The property over which the judgment-debtor has no disposing power for his own benefit cannot be attached. The remedy of a creditor by attachment being obviously inconsistent with the usual administration of the assets of an estate, it is not available against an executor or administrator as such, in respect of a debt or liability incurred by him in his personal capacity or against a legatee, until the legacy has vested in him by the executor's assent.⁶¹ The trustee of a religious endowment has no disposing power over the corpus of the trust estate exercisable for his own benefit.⁶² Goods held by a person acting in pursuance of a legal process, being in the constructive possession of the court, cannot as a general rule be attached.⁶³

56. Smith v. Alldabud Banik 23

All. 135.

57. S. 32 (1) S. E. Act III (B. C.) of 1904.

58. S. 3 Ch. E. E. Act VI of 1876 as amended by Act III (B.C.) of 1909.

59. Lotlikar v. Wagle 6 Bom. 593; Bishen Chand v. Nadir Hossein 15 I. A. 14 15 Cal. 329.

60. Peru v. Romeo II Cal. 161.

61. Fenwick v. Laycock (1811) 2 Q. B. 108.

62. Bishen Chand v. Nadir Hossein 15 I. A. 14 15 Cal. 329.

63. Whartou v. Naylor (1818) 12 Q. B. 673; Reddell v. Stowey (1811) 2 Mood. & R. 358; Russel v. E. A. Rail. Co. (1851) 20 L. J. Ch. 257.

(a) The necessary wearing apparel, etc., of the judgment-debtor and his family and such personal ornaments as in accordance with religious usage cannot be parted with by any woman, cannot be attached. Ornaments on the person of a Hindu wife forming part of her stridhan cannot be attached in execution of a decree against the husband.⁶⁴

(b) Tools of artizans, implements of husbandry of an agriculturist and such cattle and seed grain, as may be necessary to earn his livelihood as such, cannot be attached. The object being to save to the agriculturist the means of earning his support, he can claim no exemption when they are not necessary. Such portion of agricultural produce or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing, until the next harvest, for the due cultivation of the land and for the support of the judgment-debtor and his family, is exempted from attachment in the case of all or any class of agriculturist as the Local Government may, with the previous sanction of the Governor-General-in-Council, direct.⁶⁵

(c) Houses and other buildings with the materials and sites and the land immediately appurtenant thereto and necessary for their enjoyment, belonging to an agriculturist and occupied by him *bona fide* for the purposes of agriculture cannot be attached, except in execution of decrees for rent thereof.⁶⁶ But if the house has been specifically mortgaged it is not protected from sale in execution of a mortgage decree.⁶⁷

(d) A seizure and sale of account books would be productive of great injury to the debtor without a corresponding benefit to the creditor. Hence the books themselves would not be attachable on the ground of public policy.

(e) A mere right to sue for damages, *i.e.*, a claim for unliquidated damages, whether for tort committed, or for breach of contract, or for any other cause, cannot be attached. Thus, a right to mesne profits being a right to sue for damages cannot be attached.⁶⁸

64. Tukaram v. Gunaji S. Bom. H. C. A. C. 129; Appana v. Tangamma 9 Bom. 106.

65. S. 61 C. P. C. Act V of 1908.

66. Radhakisan v. Balyant 7 Bom. 530; Jivan v. Hira 12 Bom. 363; Narayan v. Gowhai 57 Bom. 415; Jamna Prosad

v. Raghunath 35 All. 397; Pandurang v. Krishnaji 28 Bom. 125.

67. Bhagvandas v. Hathibai 1 Bom. 25; Bholanath v. Kishori 31 All. 25 (F. B.)

68. Shyam Chand v. Lund Mortgage Bank 9 C. d. 695; 12 C. L. R. 110.

LECTURE V. (f) Any right of personal service cannot be attached. Thus, *vritti* being a right to receive certain emoluments as a reward for personal service is exempt from attachment.⁶⁹

(g) Stipends and gratuities allowed to pensioners of the Government and political pensions are exempt from attachment. The gratuity is a bonus allowed by Government to its servants in consideration of past services : it may be allowed in addition to pension and is exempt from attachment.⁷⁰ "Emoluments of this sort are granted for the dignity of the State and for the decent support of those persons who are engaged in the service of it. It would, therefore, be highly impolitic to permit them to be assigned ; for persons who are liable to be called out in the service of their country ought not to be taken from a state of poverty. Besides an officer has no certain interest in his half pay : for the king may at any time strike him off the list."⁷¹

A pension of a political nature payable directly by the Government of India making periodical payments of money by a treaty contracted with another sovereign power is a political pension.⁷² Arrears of political pension due to a pensioner and lying in the hands of the Government do not lose their character of political pension by reason merely of the pensioner's death.⁷³ Pensions granted by a Railway Company to its servants being private pensions are attachable.⁷⁴

(h) Allowances (being less than salary) of any public officer etc., while absent from duty is exempt from attachment.

(i) An expectancy of succession by survivorship or other merely contingent or possible right or interest cannot be attached. The interest which a Hindu reversioner has in the property of a deceased Hindu on the death of the deceased's widow is "an expectancy of succession by survivorship."⁷⁵ The interest in the pre-empted property of a successful pre-emptor who has not yet paid the pre-emptive

69. Ganesh v. Shankar 10 Bom. 395; Govind v. Ramkrishna 12 Bom. 366; Rajaram v. Ganesh 23 Bom. 131.

70. Bawan Das v. Mul Chand 6 All. 173; Muhammad v. Carlier 5 Mad. 272.

71. Sir Lord Kenyon, C. J., in Elarty v. Odium (1799) 3 Term. Rep. 684. See Ss. 11, 12 Pension Act XXIII of 1871.

72. Bi-limbai v. Imdad Ali 17 I. A.

181; 18 Cal. 216; Muthusami v. Alagia 26 Mad. 423; Lachmi Narain v. Makund 26 All. 617; Mohamed v. Mohamed 7 W. R. 169.

73. Valia v. Annajani 26 Mad. 69.

74. Bhoyrub v. Madhub 6 C.L.R. 19.

75. Run Chunder v. Dhurmo 15 W. R. F. B. 17; 7 B. L. R. 341; Anandibai v. Rajaram 22 Bom. 981.

price fixed by his decree is "a merely contingent interest."⁷⁶

(j) A right to future maintenance cannot be attached. But arrears of maintenance can be attached.⁷⁷ A hereditary grant of an allowance of paddy out of the melwaram of certain land is not a right to future maintenance.⁷⁸ When the right to maintenance is a mere personal right, it cannot be attached, but when it is an interest in property it can be attached. Thus, the right of a vendor to receive an annuity from the purchaser out of the property sold is saleable.⁷⁹

(k) Where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property, which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue, is not liable to attachment.

To affect third persons, the attachment should be open and notorious. Thus, the attachment of moveable property, other than agricultural produce, in the possession of the judgment-debtor, shall be made by actual seizure and the attaching officer shall be responsible for the due custody thereof; but if the property is subject to speedy and natural decay, or if the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.⁸⁰

Mode of attachment.

i. Moveables in judgment-debtor's possession.

In order to make a valid seizure, it is not requisite that there should be any physical contact with the goods. Any act, done by the officer which distinctly intimates to the debtor or his servants that it is intended to execute the writ, is enough.⁸¹ The officer must do such acts as would subject him to an action of trespass but for the protection of the writ, or the officer must assume such control and possession over the property that the real owner may bring replevin. The seizure of a part will bind the whole thing. The affixing of a warrant of attachment to the outer-door of the ware-house in which the goods belonging to the judgment debtor are stored, amounts to

76. Gorakh Sing v. Sidh Gopal 25 All. 383.

77. Kasheeshuree v. Greesh Chunder 6. W. R. Mis. 61; Haridas v. Baroda Kishore 27 Cal. 38; 4 C. W. N. 87; Harriss v. Brown 28 I. A. 159; 28 Cal. 621; 5 C. W. N. 729; Asad Ali v. Haidar Ali 38 Cal. 13; 12 C. L. J. 130.

78. Vaidyanatha v. Eggia 30 Mal. 279.

79. Tara Sundari v. Saroda Choran 12 C. L. J. 146; Padmanand v. Rama Prasad 17 C. W. N. 662; 16 C. L. J. 351; 16 C. W. N. 14; 14 C. L. J. 127.

80. O. 21, r. 43 C. P. C. Act V of 1908.

81. Per Lord Denman C. J., in Ball v. Thick (1845) 9 Jur. 301; Gladstone v. Padwick (1871) L. R. 6 Ex. 293.

LECTURE V.—an actual seizure.⁸² The officer to whom a warrant is delivered need not himself execute it; but he may deliver it to his subordinate.⁸³ A warrant cannot be executed after the expiration of the time specified in it for execution.⁸⁴

No person, executing any process for seizure of moveables, shall enter any dwelling house after sunset and before sun-rise.⁸⁵ Nor, shall the officer break open the outer door of a dwelling house, unless it is in the occupancy of the judgment-debtor who refuses or prevents access thereto. But, when the officer has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe any such property to be. When a room in a dwelling house is in the actual occupancy of a woman who according to the custom of the country does not appear in public, the person executing the process shall, before entering such room for the purpose of seizing the property, give notice to such woman that she is at liberty to withdraw and use every precaution to prevent its removal.⁸⁶ A shop or godown is not a "dwelling house."⁸⁷

The officer may enter the house of a third person, if property of the debtor is within it but if he enters on speculation and nothing is found which he can seize under the process, the person entitled to the possession of the house will have a right of action for trespass against him. Resistance to the taking of property by lawful authority of public servant is an offence punishable under S. 183 I. P. C. But when the goods of a wrong person are seized, the decree holder is liable to that person for damages, even though he may have acted honestly or mistakenly.⁸⁸ A suit for compensation for wrongful seizure of moveable property under legal process may be brought within one year from the date of the seizure.⁸⁹ The measure of damages is the value of the goods on the date of attachment.⁹⁰

82. Multan Chand v. Bank of Madras 27 Mad. 316.

83. Abdul Karim v. Bullen 6 All. 385; Dharam Chand v. Queen Empress 22 Cal. 596; Sheo Prakash v. Bhoop Narain 22 Cal. 759.

84. O. 21, r. 21 (3) C. P. C. Act V of 1508; Anund Lall v. Empress 10 Cal. 18; 13 C. L. R. 299; Abinash v. Ananda 31 Cal. 124.

85. In England a writ of Fieri Facias cannot be executed on a Sunday in consequence of Sunday Observance Act, 1677.

86. S. 62 C. P. C. Act V of 1908.

87. Damodar v. Ishwar 3 Bom. 89.

88. Goma v. Gokaldas 3 Bom. 74.

89. Art 29 Sch. I Limitation Act IX of 1908.

90. Kissory Mohun v. Hursukh Das 17 I. A. 17; 17 Cal. 436.

The attachment of agricultural produce shall be made by affixing a copy of the warrant of attachment (*a*) on the land on which such produce has grown, or (*b*) on the threshing floor, or where it is deposited and another copy on the outer door, or some other conspicuous part of the house in which the judgment-debtor ordinarily resides, or with the leave of the Court on the outer door or on some other conspicuous part of the house in which he carries on business, or personally works for gain, or in which he is known to have last resided or carried on business or personally worked for gain.⁹¹

LECTURE V.
ii. Agricultural produce.

Where agricultural produce is attached, the judgment-debtor may, subject to such condition as may be imposed by the Court, cut, gather, and store the produce and do any other act necessary for maturing or preserving it and if the judgment-debtor fail to do all or any of such acts, the decree-holder may, with the permission of the Court, do them either by himself or by any person appointed by him and the costs incurred shall be recoverable, as if they formed part of the decree. Where an order for attachment has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit and may make a further order prohibiting the removal of the crop pending the execution of the order of attachment. A growing crop which does not from its nature admit of being stored shall not be attached at any time less than 20 days before the time at which it is likely to be fit to be cut or gathered.⁹²

The effect of seizure is to vest in the officer a *special* property in the goods seized, enabling him at the sale under the process to take the *general* property in them out of the judgment-debtor and to vest it in the purchaser and in the interval, if necessary, to maintain an action in respect of any damage done to the goods seized in his own name. The *general* property remains in the debtor. The execution-creditor acquires no *property*, either *general* or *special*, in the goods seized; and if any attempt is made on the part of the debtor or of a third person to deprive him of the fruits of the execution, he can only look to the officer for the vindication of his rights.⁹³ Though the general property in goods pledged remains in the pledgor, the goods pledged by the judgment-debtor, actually

Effect of
seizure.

91. O. 21, r. 44 C.P.C. Act V of 1908.

93. Giles v. Grover (1832) 1 Cl. & Fin.

92. O. 21, r. 45 C.P.C. Act V of 1908.

72.

LECTURE V.

iii. Moveables
not in pos-
session of
judgment-
debtor.

(a) Debt.

and constructively in the possession of the pledgee, cannot be removed, so as to affect the pledgee's right over them, except upon payment of the amount to secure which they are in pawn.⁹⁴

The attachment of a debt, not secured by a negotiable instrument, shall be made by a written order prohibiting the creditor from recovering the debt and the debtor from making payment thereof, until the further order of the Court.⁹⁵ The attachment must operate at the time when it is made, so the debt must be an ascertained and definite amount actually due to the judgment-debtor, payable, either presently, or in the future, by reason of a present obligation. Thus, allowance, private pension and wages of private servants that have become due are debts.⁹⁶ Where the debtor gave a cheque to the judgment-debtor, there are no funds in the debtor's hand to be attached, although the cheque was not then presented for payment.⁹⁷

Debts, which are due contingently and which, therefore, may never become due, are not subject to garnishment.⁹⁸ The sum attached must be one which the debtor could, if it had actually accrued due and but for the attachment-order, recover from the garnishee by action. When the debt sought to be attached is a debt due to the judgment-debtor and another person it cannot be attached to answer the debt of the former.⁹⁹ The absence of the judgment-debtor's creditor from British India does not prevent the debt from being attached.¹⁰⁰ But, a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of the Court cannot be attached.¹⁰¹ The exact amount of the debt need not be stated.¹⁰² The attachment does not prevent the judgment-debtor from suing his debtor for it, or prosecuting the

94. Young v. Lambert (1870) L. R. 3 P. C. 112; Rogers v. Kemnay (1846) 9 Q. B. 592; 15 L. J. Q. B. 381.

95. O. 21, r. 46 (1) C. P. C. Act V of 1908.

96. Padmanand v. Runa Prasad 16 C. W. N. 11; 11 C. L. J. 127; Haridas v. Baroda Kishore 27 Cal. 38; 4 C.W.N. 87; Nilkunto v. Hurro 3 Cal. 414; 1 C. L. R. 412; Tuffazal v. Raghomath 14 Moo. 40; 7 E. L. R. 186; Har

Shankar v. Baijnath 23 All. 161; Sher Singh v. Sri Ram 30 All. 216; Almud-uddin v. Majlis Rai 3 All. 12; Phul

Chand v. Chand Mad. 30 All. 252; Kishen-

sheree v. Greesh Chunder 6 W. R. Mis. 61; Bhoyrub v. Madhub 6 C. L. R. 19; Ayyavayar v. Virasami 21 Mad. 393; Debi Prasad v. Lewis 31 All. 304.

97. Bhagyandas v. Abdul Hussein 3 Bom. 49.

98. Freeman on executions § 164.

99. Macdonald v. Tacqua Gold mines (1884) 13 Q. B. D. 535.

100. Ghamshamlal v. Bhansali 5 Bom. 249.

101. Begg Dunlop & Co. v. Jagannath 39 Cal. 104; 16 C. W. N. 402.

102. Mudho Das v. Ranji 16 All. 286,

suit already instituted.¹⁰³ The debt sought to be attached must not be affected by any trust other than for the benefit of the debtor. Thus, if the debtor be an executor and the debt is due to the estate, his own creditor has no right or claim to attach it.¹⁰⁴

The "debt" includes a mortgage-debt and the attachment should be made in the same manner as any other debt; and the purchaser can sue for the recovery of the mortgage-debt personally as well as by sale of the mortgaged property, even if it had not been attached under O. 21, r. 54 C. P. C. Act V of 1908.¹⁰⁵ Where the garnishee (judgment-debtor's debtor) disputes his liability, the Court may order that any issue or question necessary for the determination of his liability be tried or determined in any manner in which any question or issue in an action may be tried or determined,¹⁰⁶ and the decreee-holder may have it sold or have a receiver appointed under S. 51 C. P. C. Act V of 1908 to recover the debt from him by a suit.¹⁰⁷

A share in the capital of a Corporation may be attached by a written order prohibiting the person in whose name it may be standing from transferring the same or receiving any dividend thereon.¹⁰⁸ The attachment of other moveable property not in possession of the judgment-debtor, except the property deposited in or in the custody of any Court, shall be made by a written order prohibiting the person in possession of the same from giving it over to the judgment-debtor.¹⁰⁹ The prohibitory order shall be affixed on some conspicuous part of the Court-house and shall also be served on the person prohibited.¹¹⁰

Where the property to be attached is the share or interest of the judgment-debtor in moveable property jointly belonging to him and another co-owner, the attachment shall be made by a notice

LECTURE V.

(b) Shares.

(c) Goods.

103. *Shib Singh v. Sitaram* 13 All. 76; *Beti v. Coll. of Etwah* 22 I. A. 31; 17 All. 198.

104. *Bounch v. Sevenoaks Rail. Co.* (1879) 4 Ex. D. 133.

105. *Karim-un-nissa v. Phul Chand* 15 All. 134; *Debendra Coomar v. Roop Lall* 12 Cal. 516; *Kashinath v. Sadasi-a* 20 Cal. 805; *Badley v. Runchandra* 19 Bom. 121; *Tarvadi v. Bai Kashi* 26 Bom. 305; *Muniappa v. Subra Mania*

18 Mad. 437.

106. See O. XLV r. 1 Rules of the Supreme Court, 1883.

107. *Toolsa.v. Antone* 11 Bom. 418.

108. O. 21, r. 15 (1) C. P. C. Act V of 1908.

109. O. 21, r. 16 (1) C. P. C. Act V of 1908.

110. O. 21, r. 16 (2) C. P. C. Act V of 1908.

LECTURE V.

to the judgment-debtor from transferring or charging it in any way.¹¹¹

i.e. Partnership property.

The property belonging to a partnership shall not be attached or sold in execution of a decree, other than a decree passed against the firm or against the partners in the firm as such.¹¹² But on the application of the holder of a decree against a partner, the Court may make an order charging the interest of such partner in the partnership property and profits with payment of the decretal amount and appointing a receiver and making an order for the sale of such interest.¹¹³

v. Negotiable instrument.

The attachment of a negotiable instrument not deposited in Court, nor in the custody of a public officer, shall be made by actual seizure.¹¹⁴ The attachment of property in the custody of a Court or public officer shall be made by a notice to such Court or officer requesting that such property and any interest or dividend becoming payable thereon may be held subject to the further order of the Court issuing the notice and any question of title or priority arising between the decree-holder and any person other than the judgment-debtor shall be determined by such Court.¹¹⁵

vi. Decree.

The attachment of a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, shall be made by an order of the Court, if the decree were passed by itself, but otherwise by a notice requesting the Court which passed the decree to stay the execution of its decree.¹¹⁶ If the Court executes the decree notwithstanding the notice, its proceedings will be *ultra vires*.¹¹⁷ Decrees other than money-decrees and mortgage-decrees may also be attached by a notice by the Court prohibiting the holder of the decree from transferring or charging the same in any way,¹¹⁸ but there being no provision for execution of these decrees in the above manner, they must be sold like other saleable properties.¹¹⁹ An

111. O. 21, r. 17 C. P. C. Act V of 1908.

112. O. 21, r. 49 (1) C. P. C. Act V of 1908.

113. O. 21, r. 49 (2) C. P. C. Act V of 1908.

114. O. 21, r. 51 C. P. C. Act V of 1908.

115. O. 21, r. 52 C. P. C. Act V of 1908.

116. O. 21, r. 53 (1) C. P. C. Act V

of 1908.

117. Manick Lal v. Bonomali 32 Cal. 1101; 10 C. W. N. 193; 3 C. L. J. 27; Barhma Din v. Baji Lal 26 A.H. 91.

118. O. 21, r. 53 (4) C. P. C. Act of 1908.

119. Compare S. 273 of Act XIV of 1882 in which the words "or the sale in enforcement of a mortgage or charge" were absent. Hence there was a conflict of ruling as to whether mortgage decrees

adjustment of the decree subsequent to the attachment cannot be recognized,¹²⁰ This rule applies only "where the right attached is a right expressly settled by the decree and not a right arising from the decree by way of restitution."¹²¹

Immoveable property shall be attached by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. The order shall be proclaimed at some place on, or adjacent to, such property by beat of drum or other customary mode and a copy of the order shall be affixed on the property, in the Court-house and in the Collectorate of the district if the land pays revenue.¹²² The equity of redemption of a mortgagor is immoveable property.¹²³ So is the life-interest taken by a Parsi widow under her husband's will in the income of his immoveable property.¹²⁴

If the decree is set aside or reversed, or if the decretal amount with all costs are paid into Court, or if the satisfaction of the decree is made through or certified to the Court, or if by reason of the decree-holder's default the Court is unable to proceed with the execution and the application is dismissed, the attachment shall cease without an express order or notwithstanding the order that the property would remain under attachment;¹²⁵ but if the application is subsequently restored on review, attachment revives.¹²⁶ There is no substantial difference between an order striking off an application and one dismissing it for default.¹²⁷ But an order for

LECTURE V.
vii. Immo e-
able property.

Attachment
withdrawn.

could be sold or executed like money decrees; see *D. & L. Bank v. Partab Singh* 28 All. 771; *Vaidhinadasamy v. Somasundram* 28 Mad. 473.

120. O. 21, r. 53 (6) C. P. C. Act V of 1908; *Gopal v. Joharimal* 16 Bom. 522.

121. *Vasudeva v. Narayana* 24 Mad. 341.

122. O. 21, r. 54 C. P. C. Act V of 1908.

123. *Parashram v. Govind* 21 Bom. 226.

124. *Natha v. Dhunbaiji* 23 Bom. 1.

125. O. 21, r.r. 55,57 C. P. C. Act V of 1908; see *Krishna Subudbi v. Janaki Ram* 19 C. L. J. 248; *Patringa Koer*

v. *Madhavanand Ram* 16 C.W.N. 332; 14 C. L. J. 476; *Namuna Bibi v. Roshan Mia* 38 Cal. 482; 13 C. L. J. 621; *Sorabji Cooverji v. Kala Raghunath* 36 Bom. 156.

126. *Aziz Bakhsh v. Kaniz Fatima* 34 All. 490; *Mukhtar Ahmad v. Muqarrab* 34 All. 530.

127. *Upendra Chandra v. Sakhi* 7 C. L. J. 301; *Mandhyan Sheikya v. Badram Dalni* 17 C. W. N. 204. Under S. 275 Act XIV of 1882 the effect of striking off of execution proceedings did not necessarily put an end to the attachment. It was a question of fact and depended on the circumstances of each case; see *Puddomonee v. Muthooranath*

LECTURE V.

attachment before judgment subsists for the benefit not only of the first application but also of the subsequent application.¹²⁸ When the suit is dismissed an attachment before judgment ceases and does not revive on the reversal of the judgment on appeal.¹²⁹

Claims and objections to attachment.

No stranger to the action can obtain an order quashing the execution. To this rule an exception probably exists in favor of persons who, though not parties to the action, must necessarily be prejudiced by the enforcement of the writ, such as, subsequent purchasers, lien-holders and execution or attachment creditors.¹³⁰ If a claim to, or an objection to the attachment of, property is made, it should be investigated by the Court, unless the claim or objection was disingenuously or unnecessarily delayed and pending the investigation the sale may be stayed.¹³¹ This rule merely gives a claimant, not a party to the suit, a speedy and summary remedy but it does not deprive him of his remedy by suit.¹³²

Where the property is not subject to execution, it is not necessary for the claimant to make any claim during the course of the proceedings taken for the sale of his property, for whether he makes such claim or not, the sale is absolutely void and the purchaser may be successfully resisted in any action which he may bring for the purpose of recovering possession, or of enforcing any other claim which he may choose to make.¹³³ But a judgment-debtor, who might have raised objections prior to sale but who has refrained from doing so, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable.¹³⁴ If,

- 12 B. L. R. 111; 20 W. R. 133; Kishen Lal v. Charat Singh 23 All. 114; Peary Lal v. Chandi Charan 11 C. W. N. 163; 5 C. L. J. 80; Kamarudin v. Jawahir 32 I. A. 102; 27 All. 331; 1 C. L. J. 381; Bhagwan v. Khetter Moni 1 C. W. N. 617; Rangasami v. Periasami 17 Mad. 58; Mungul Pershad v. Grika Kant 8 I. A. 123; 8 C. d. 51; 11 C. L. R. 113; Srinivasa v. Sami Rum 17 Mad. 180; Mahomed Mozaffer v. Kishori Mohun 22 I. A. 129; 22 Cal. 609; Hafiz v. Abdullah 16 All. 133.
128. Ganesh Chandra v. Banwari Lal 16 C. W. N. 1097; 16 C. L. J. 86.
129. Swirama Kumari v. Meherban Khan 13 C. L. J. 213.

130. Freeman on Executions § 75.
131. O. 21, r. 58 C. P. C. Act V of 1908.
132. Sundar Singh v. Ghasi 18 All. 410; Krishnachupati v. Vikarama 18 Mad. 13; Raghunath v. Sarosh Kama 23 Bom. 266; Kunhaya Ld v. National Bank of India 40 I. A. 56; 40 Cal. 598; 17 C. W. N. 541; 17 C. L. J. 478.

133. Freeman on Void Judicial Sales § 35.

134. Gopal Chandra v. Notobar 16 C. W. N. 1029; Umed v. Jas Ram 29 All. 612; Basti Ram v. Fattu 8 All. 116; Ramchhabai v. Beechu 7 All. 611; Panditang v. Krishanji 28 Bom. 125; Gabu Khedta v. Kashi Muddi

however, he was not aware of the proceedings in attachment and sale, the application to set aside the sale would be entertained.¹³⁵

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Where the property is directed to be sold in execution of a mortgage-decree the rule does not apply, as the property does not require to be attached in execution of such a decree, for the right of sale does not depend upon the attachment but is conferred by the decree itself.¹³⁶ An omission to take exception to the validity of attachment, on the ground that the property sought to be attached is not transferable at the time when the application was made for attachment before judgment, does not preclude an investigation of the objections when an application is made for execution of the decree.¹³⁷

To prevent confusion in the execution of decrees when attachment is made in execution of decrees of more Courts than one, the Court of the highest grade, or where there is no difference in grade between such Courts, the Court under whose decree the property was first attached shall receive or realize such property and determine any claim thereto or any objection to the attachment thereof.¹³⁸ The course to be adopted by the Court of higher grade in a case where the sale is made by the lower Court is to accept the sale and send for the sale proceeds for distribution amongst the decree-holders.¹³⁹

Investigation
of claims and
objections.

27 Cal. 415 ; 4 C. W. N. 557 ; Majed Hossen v. Raghubar 27 Cal. 187.

135. Durga Charan v. Kali Prasanna 26 Cal. 727 ; 3 C. W. N. 586 ; Daulat Singh v. Jugal Kishore 22 All. 108.

136. Daya Chand v. Hem Chand 4 Bom. 515 ; Venkatamarasammah v. Ramiah 2 Mad. 108 ; Himatram v. Khushal 18 Bom. 98 ; Deefholts v. Peters 14 Cal. 631 ; Sanwal Das v. Bismillah 19 All. 480 ; Womda Khanum v. Raj-roop 3 Cal. 345 ; 1 C. L. R. 295.

137. Basiram v. Kattyayani 38 Cal. 448.

138. S. 63 (1) C. P. C. Act V of 1908 ; Turmuklal v. Kalyandas 19 Bom. 127 ; Ballu Ram v. Raghbar 16 All. 11 ; Ram Narain v. Mina 25 Cal. 46 ; Bykant Nath v. Rajendra Narain 12 Cal. 333. Compare the words "has been attached" in S. 285, Act XIV of 1882 ; Stowell v. Ajudhia 6 All. 255. Under

S. 285 Act XIV of 1882 when a sale was effected by a Court of lower grade in a case where it ought to have been effected by a Court of higher grade the sale according to Calcutta, Bombay and Madras decisions was not for that reason invalid ; Bykant Nath v. Rajendra Narain 12 Cal. 333 ; Ram Narain v. Mina 25 Cal. 46 ; Gopi Chand v. Kasimunissa 34 Cal. 836 ; 6 C. L. J. 130 ; Abdul Karim v. Thakordas 22 Bom. 88 ; but according to the Allahabad decisions it was absolutely void as one made without jurisdiction : Chiranjit v. Jawahir 26 All. 538 ; Har Prasad v. Jagan Lal 27 All. 56 ; Durpati Bibi v. Ram Rach Pal 31 All. 527.

139. S. 63 (2) C. P. C. Act V of 1908 ; Bykant Nath v. Rajendra Narain 12 Cal. 333 ; Patel Naranji v. Haridas 18 Bom. 458.

LECTURE V.
Claimant is
to prove pos-
session only.

The claimant or objector must show that at the date of attachment he had some interest in, or was possessed of, the property.¹⁴⁰ But he cannot ask the Court to inquire into any error or irregularity of judgment or execution which is merely voidable and which has not been quashed or set aside. It is open to an insolvent judgment-debtor in a proceeding under the Provincial Insolvency Act III of 1907 to raise the question whether the property ordered to be sold is or is not saleable.¹⁴¹

The execution-creditor not being bound by estoppels affecting the debtor, goods can be seized to which the latter would be precluded from asserting any title and he can also in the event of litigation set up defences which the execution-debtor could not raise.¹⁴² Similarly, when the property in the goods remains in the debtor, but he is prevented by estoppel from asserting his right in them, the execution-creditor may nevertheless, as against a claimant, avail himself of his debtor's title.¹⁴³ The claimant is not bound by the recital in the decree.¹⁴⁴

A mortgagee in possession of the mortgaged property at the time of attachment can claim to have the attachment removed.¹⁴⁵ In the investigation, which is a summary one, the Court has to determine merely the question of possession and it cannot go into the question of title with respect to the property attached.¹⁴⁶ The possession is not restricted to a mere tangible or physical possession but includes constructive possession or possession in law of debts and other intangible property.¹⁴⁷

Release from
attachment

Property at the time of attachment, not in the possession of the judgment-debtor, or some person in trust for him, or in the possession of the judgment-debtor, not on his own account but on account of, or in trust for, some other person, shall be released from attachment.¹⁴⁸ It is not necessary to show that the trust is one capable

140. O. 21, r. 59 C.P.C. Act V of 1908.

H. C. 100.

141. Arman Sardar v. Satkhira Joint Stock Co. 18 C. L. J. 561.

146. Monmohiney v. Radha Kristo 29 Cal. 543; Hamid v. Bukhtear 14 Cal. 617; Sheoraj v. Gopal 18 Cal. 290.

142. Chase v. Goble (1841) 2 Man. & G. 930; but see Edwards v. English (1857) 26 L. J. Q. B. 193.

147. Chidambara v. Ramanay 27 Mad. 67; see *contra*, Harilal v. Abhesang 4 Bom. 323.

143. Richards v. Johnson [1859] 28 L. J. Ex. 322.

148. O. 21, r. 60 C. P. C. Act V of 1908; Bhagwan v. Khetter Moni 1 C. W. N. 617; Salhapathee v. Narayana-

144. Sarba Sundari v. Harendra Lal 12 C. L. J. 519.

rami 25 Mad. 555; see also Bhaiji v.

145. Kassilay v. Vithaldas 10 Bom.

of enforcement by law.¹⁴⁹ But if the property was, at the time of attachment, in the possession of the judgment-debtor as his own property, or was in the possession of some other person in trust for him, the Court shall disallow the claim.¹⁵⁰ An order for the benefit of one decree-holder does not enure for the benefit of other decree-holders, not made parties to the proceedings.¹⁵¹ If the property is subject to a mortgage or charge in favor of some person not in possession, the Court may continue the attachment subject to such mortgage or charge.¹⁵²

An order allowing or disallowing a claim or an objection made by a party to the suit or proceeding, or his legal representatives comes under S. 47 C. P. C. Act V of 1908 and is therefore a decree and is appealable; hence a separate suit is barred.¹⁵³ So, also an order passed on an objection made by one represented by the judgment-debtor comes under S. 47 C. P. C. Act V of 1908.¹⁵⁴ But where the order is made against a third person it is not appealable; his remedy is by a regular suit.¹⁵⁵ If the judgment-debtor or his legal representative objects to the attachment on the ground that he holds it as a trustee on behalf of a third party, not a party to the suit, the order comes under O. 21, r. 58 C. P. C. Act V of 1908.¹⁵⁶ An order under O. 21, r.r. 60, 61, 62 C. P. C. Act V of 1908 made by a judge on the original side of the High Court of Calcutta,

Order appealable in certain cases.

Administrator-General of Bombay 23
Bom. 418 ; Velji v. Bharmal 21 Bom. 287.

149. W. C. McIntosh v. Bidhu Bhusan
16 C. W. N. 959.

150. O. 21, r. 61 C. P. C. Act V of
1908 ; Hamid v. Bakhtear 14 Cal. 617.

151. Jagan Nath v. Ganesh 18 All.
413.

152. O. 21, r. 62 C. P. C. Act V of
1908.

153. Rajbansi v. Mahabir 9 C. L. J.
358 ; Ram Narain v. Bandi Pershad 31
Cal. 737 ; Trimbak v. Govinda 19 Bom.
328 ; Majed v. Raghbir 27 Cal. 187 ;
Gahar v. Kashi 27 Cal. 415 ; 4 C. W. N.
557 ; Seth Chand v. Durga 12 All. 313 ;
Punehanun v. Rabia Bibi 17 Cal. 711 ;
Kali Charan v. Jewat 28 All. 51 ;
Vengapayyan v. Karimpanakal 26 Mad.

501 ; Madhusudan v. Govinda 27 Cal. 34 ;
4 C. W. N. 417.

154. Marivittil v. Pathram 30 Mad.
215 ; Kamal Kutti v. Ibrayi 24 Mad. 658.

155. Abdul v. Muhammad 4 All.
190 ; Dayaram v. Goverdhanadas 28 Bom.
458.

156. Kartick Chandra v. Ashutosh
39 Cal. 298 ; 16 C. W. N. 26 ; 14 C. L.J.
425 (F.B.) ; Ramanathan v. Levvai 23
Mad. 195 ; Murigeya v. Hayat Saheb 28
Bom. 237 ; Budrudeen v. Abdul Rahim
31 Mad. 125 ; Bhajahari v. Ram Lal 6
C. W. N. 63 ; Mandaleswara v. Mahant
Dossji 32 Mad. 129 ; Ram Krishna
v. Padma Charan 6 C. W. N. 663 ;
Amar Chund v. Nani Gopal 12 C. W.
N. 308.

LECTURE V.

Declaratory
suit.

Madras or Bombay is a "judgment" and is appealable under clause 15 of the Charter.¹⁵⁷

The party, against whom an order is passed on investigation, may institute a suit to establish his right to the property in dispute, i.e., the right to have it sold or released it from attachment and not the right to the property itself.¹⁵⁸ There is no law prescribing the extent of the investigation.¹⁵⁹ But it is only an order purporting to deal with the claim on the merits and not dismissing it for default is an order passed on investigation.¹⁶⁰ To decide whether a claim is really one under O. 21, r. 58 C. P. C. Act V of 1908, the Court must look to the substance of the claim and order and not merely to their form and language.¹⁶¹

Omission to
bring suit
concludes the
parties

Unless a suit is brought within one year from the date of the order, the order is conclusive and the party against whom the order is made cannot assert the right denied to him by the order.¹⁶² The object of Art. 11 Sch. I Limitation Act IX of 1908 is to secure prompt and speedy determination of the questions raised in execu-

157. Sabhapathi v. Narayanasami 25 Mad. 555.

158. O. 21, r. 63 C. P. C. Act V of 1908; Morshia Barayal v. Elahi Bux 3 C. L. J. 381; Kedar Nath v. Rakhal Das 15 Cal. 674; Krishna Prasad v. Bepin Behari 31 Cal. 228; Mitchell v. Mathura Dass 12 I. A. 150; 8 All. 6; Narayanrao v. Balkrishna 4 Bom. 529; Ganesh v. Kashi Nath 26 All. 89; Bhagwan Das v. Raj Nath 34 All. 365.

159. Surnamoyi v. Ashutosh 27 Cal. 714; Rahimbux v. Abdul Kader 32 Cal. 537; Sarat v. Tarini 34 Cal. 491; 11 C. W. N. 487; Kunj v. Kandu 6 C. L. J. 362; Aliman v. Dhakeshwari 1 C. L. J. 296.

160. Sarala v. Kumala 31 Mad. 5; 17 M. L. J. 551; Kooyana v. Doosy 29 Mad. 225; 16 M. L. J. 136; Jadoonath v. Radhamonee 7 W. R. 256; B. L. R. Sup. 643; Kamessur v. Kadir 20 W. R. 393; Rush Behari v. Gopinath 11 C. L. R. 352; Jugobundhoo v. Sachya 16 W. R. 22; Chandra Bhushan v. Ram Kanth 12 Cal. 108; Bhikha v. Sakarlal 5 Bom. 440; Pullamma v. Pradosham 18

Mad. 316; Munisami v. Arunachala 18 Mad. 265; Shiro Narain v. Mudden Ally 7 Cal. 608; 9 C. L. R. 8; Sardhari Lal v. Ambika Pershad 15 I. A. 123; 15 Cal. 521; Khub Lal v. Ram Lochan 17 Cal. 260; Neerigauda v. Paresha 22 Bom. 640; Sarat v. Tarini 34 Cal. 491; 11 C. W. N. 487; Angan Lal v. Gudar Mal 10 All. 479; Meerudin v. Rahisa Bibi 27 Mad. 25; Yashwant v. Vithoba 12 Bom. 231.

161. Surnamoyi v. Ashutosh 27 Cal. 714; Bukshi v. Sheo Pergash 12 Cal. 453.

162. O. 21, r. 63 C. P. C. Act V of 1908; Art. 11 Sch. I Limitation Act IX of 1908; Nilo v. Rama 9 Bom. 35; Bailur v. Lakshmana 4 Mad. 302; Neerigauda v. Paresha 22 Bom. 640; Khub Lal v. Ram Lochan 17 Cal. 260; Surnamoyi v. Ashutosh 27 Cal. 714; Kooyana v. Doosy 29 Mad. 225; 16 M. L. J. 136; Harishankar v. Naran 18 Bom. 260; Rahimbux v. Abdul Kader 32 Cal. 537; Rajaram v. Raghubansman 24 Cal. 563; Sardhari Lal v. Ambika Pershad 15 I. A. 123; 15 Cal. 521.

tion sales and that object would be frustrated, if a party, unsuccessful on account of his own laches or voluntary non-production of evidence, were allowed to plead that the order was a nullity, notwithstanding that the proceeding was contentious until the day of hearing.¹⁶³

As the object of a claim is merely to obtain the removal of an attachment, it follows that when the decree in execution of which the property was attached, was satisfied within one year from the date of the order, a suit brought by a claimant to recover possession of the property is not barred by Art. 11 Sch. I Limitation Act IX of 1908.¹⁶⁴ Nor, is the claimant obliged to bring a suit, for he may prevent the sale by paying the decretal amount and then sue the judgment-debtor for money paid under compulsion of law i.e., under pressure of execution-proceedings.¹⁶⁵ Though attachment of a person's land gives him a cause of action on which he could have brought on action but did not, yet the sale of the same at a later date gives him a fresh cause of action on which he could sue within six years from the date of sale under Art. 120 Sch. I Limitation Act IX of 1908.¹⁶⁶

If standing crops attached be sold pending the investigation, the claim does not become nugatory but the successful claimant is entitled to the price realized at the sale without deduction for harvesting charges, as Ss. 69 and 70 I.C. Act IX of 1872 do not apply to such a case.¹⁶⁷

When a question has been tried the matter is *res judicata* and cannot be reopened, merely because the assignee from the judgment-debtor has not been made a party.¹⁶⁸ But an order in favor of one decree-holder does not enure for the benefit of other decree-holders, not parties to the proceedings.¹⁶⁹ In a suit by the decree-holder

Suit unnecessary.

163. *Aliman v. Dhakeshiwar* 1 C.L.J. 296; *Lachmi v. Martindell* 19 All. 253.

164. *Krishna v. Bepin* 31 Cal. 228; *Ibrahimbhai v. Kabulabbhai* 13 Bom. 72; *Gopal Purshotum v. Bai Divali* 18 Bom. 241; *Umesh Chunder v. Raj Bullub* 8 Cal. 279; 10 C. L. R. 20; *Kashinath v. Ramchandira* 7 Bom. 408; *Morshia Barayal v. Elahi Bux* 3 C. L. J. 381.

165. *Dulichand v. Ram Krishna* 8 I. A. 93; 7 Cal. 648; *Kanheya Lal v. National Bank of India* 40 I. A.

56; 10 Cal. 598; 17 C. W. N. 541; 17 C. L. J. 478; *Jugdeo v. Raja Singh* 15 Cal. 656; *Jasvatsingji v. Sec. of State* 14 Bom. 299.

166. *Amant Hrazu v. Narayanrazu* 36 Mad. 383.

167. *Rasik Chandra v. Jitendra Kumar* 15 C. L. J. 167.

168. *Umesh Chandra v. Madhu Sudan* 9 C. L. J. 356; *Ram Kirpal v. Rup Kuari* 11 I. A. 37; 6 All. 269.

169. *Jagan Nath v. Gunes* 18 All. 113.

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the judgment-debtor is not a necessary party.¹⁷⁰ But in a suit by an unsuccessful claimant the judgment-debtor is a necessary party.¹⁷¹ The claimant may in this suit also ask for any further or consequential relief e.g., damages for wrongful seizure but he is not bound to do so.¹⁷²

Unless an order is passed against a person, he need not bring his suit within one year from the date of the order.¹⁷³ The judgment-debtor is not necessarily "a party against whom an order is made" so as to preclude him from instituting a suit against a successful claimant within the ordinary period of limitation applicable to the suit to establish his title to the property released.¹⁷⁴ As a rever-sioner has no right to sue for possession during the widow's life-time, he is not debarred from suing for possession after one year from the date of the order rejecting his claim.¹⁷⁵

The plaint in such a suit is chargeable with a court fee stamp of Rs. 10 under Art. 17 Cl. 1, Sch. II of the Court-Fees Act VII of 1870 though the plaintiff may claim consequential relief.¹⁷⁶ The burden of proofs lies on the plaintiff as in other cases.¹⁷⁷ The defendant can shew that the transfer to the claimant plaintiff was with intent to defraud him.¹⁷⁸

Effect of attachment.

Attachment is taking property into the custody of law; it confers no title on the attaching creditor in the property itself. He merely acquires a lien or right to have the property kept in *custodia legis* and to make it available for the satisfaction of his decree by cutting off all subsequent assignments and transfers and

170. Ghasi Ram v. Mangal Chand 28 All. 41.

171. Ghasi Ram v. Mangal Chand 25 All. 41.

172. Sadu bin v. Ram bin 16 Bom. 608 ; Kissorimohun v. Harsukh Das 17 I. A. 17 ; 17 Cal. 436 ; Ambu v. Kethlamma 11 Mad. 23 ; Krishnam v. Pathma 29 Mad. 151.

173. Rutnessur v. Majeda 7 W. R. 252 ; Monohur v. Troyluckho 4 W. R. 35 ; Rash Behari v. Gopinath 11 C. L. R. 352 ; Jodoonath v. Radhamonee B. L. R. Sup. 613 ; 7 W. R. (F.B.) 256 ; Rajaram v. Raghubansman 21 Cal. 563.

174. Shivapa v. Pod 11 Bom. 114 ; Kedar Nath v. Rakhal Das 15 Cal. 674 ;

Guruva v. Subbarayulu 13 Mad. 366 ; Moideen v. Kunhi 25 Mad. 721 ; Krishnasami v. Somesundaram 30 Mad. 335 ; Vadapalli v. Dronamaraju 31 Mad. 163.

175. Tai v. Ladu 20 Bom. 801 ; Rvijaram v. Raghubansman 21 Cal. 563 ; Mukhun v. Koondun 2 I. A. 210 ; 15 B. L. R. 228 ; 21 W. R. 75.

176. Dhondo v. Govind 9 Bom. 20 ; Phul Kumari v. Ghanashyam 35 I. A. 22 ; 35 Cal. 202 ; 12 C. W. N. 169 ; 7 C. L. J. 36.

177. Nannhi Jan v. Bhuri 30 All. 321.

178. Abdul Kader v. Ali Mia 16 C. W. N. 717.

an unlawful interference with that right constitutes an actionable wrong, for an order for sale after attachment on a money decree creates a valid charge on the property.¹⁷⁹ Thus, when a vesting order has been made by the Insolvent Debtor's Court, the Official Assignee is, whether the attachment be one before judgment or in execution of a decree made prior to the vesting order, entitled to claim the attached property for the benefit of all the creditors inducing the attaching creditor of the insolvent, who stand on the same footing and can claim a rateable distribution of the assets of the insolvent in the hands of the Official Assignee.¹⁸⁰ An execution does not lose any lien by being subsequently suspended in its operation by a judicial stay, such as an injunction. As property under attachment is considered to be in the custody of the Court an attachment is not dissolved on the death of either party.¹⁸¹

When an attachment has been made, whether before or after judgment, any private transfers or delivery of the property attached or of any interest therein and any payment to the judgment-debtor, contrary to such attachment, is void as against all claims enforceable under the attachment including the claims for the rateable distribution of assets.¹⁸² The object of this provision is to prevent fraud on decree-holders and to keep intact the rights of the attaching creditor against the attached property.¹⁸³ The renewal or assignment of an existing obligation, e.g., a mortgage already existing, pending the attachment, is not a transfer, nor does it prejudice

179. *Jogendra Nath v. Monmota Nath* 17 C. W. N. 80; 16 C. L. J. 565; *Sooob Chunder v. Russick Lall* 25 C. d. 202; *Sasirama Kumari v. Meherban Khan* 13 C. L. J. 243; *Motilal v. Karabuddin* 24 I. A. 170; 25 Cal. 179; 1 C. W. N. 693; *Patringt Koer v. Madhavanan Ram* 16 C. W. N. 332; 14 C. L. J. 476; *Peacock v. Madan Gopal* 29 Cal. 428; 6 C. W. N. 577; *Kristnaswamy v. Official Assignee of Madras* 26 Mad. 673; *Norton v. Yates* (1906) 1 K. B. 112; *Golap Khan v. Bholanath* 11 C. W. N. 677; 12 C. L. J. 585; 7 Ind. Cas. 487; *Madho Parshad v. Mehrban* 17 I. A. 191; 18 Cal. 157; *Zenimdar of Karvetnagar v. Trustee of Tirumalai* 32 Mad. 129; 14 C. W. N. 677; *Suraj*

Bansi v. Sheo Pershad 6 I. A. 88; 5 Cal. 148; 4 C. L. R. 226; *Sankaralinga v. Kandasumi* 30 Mad. 413.

180. *Kristnaswamy v. Official Assignee of Madras* 26 Mad. 673; *Peacock v. Madan Gopal* 29 Cal. 428; 6 C. W. N. 577; *Sadayappa v. Ponnama* 8 Mad. 554; *Shib Kristo v. Miller* 10 Cal. 150; 13 C. L. R. 433; *Turner v. Pestonji* 29 Bom. 103.

181. *Peary Lal v. Chandi Charan* 11 C. W. N. 163; 5 C. L. J. 80.

182. S. 61, O. 38, r. 5 C. P. C. Act V of 1908.

183. *Shivlingappa v. Chambasappa* 30 Bom. 337; *Dinobundhu v. Jogmaya* 29 I. A. 9; 29 Cal. 154; 6 C. W. N. 209.

LECTURE V. the rights of the attaching creditor.¹⁸⁴ But if the amount secured by the renewed mortgage or by the assignment exceeds the amount due on the mortgage at the date of attachment, new security to that extent will be void.¹⁸⁵ The transfer of an easement is a transfer of an interest in immoveable property.¹⁸⁶ The transferee is a representative of the judgment-debtor and is bound by the decree so far as the interest transferred is concerned.¹⁸⁷

The attachment must be effectual.¹⁸⁸ A private transfer is not absolutely void but void only as against all claims *enforceable* under the attachment *i.e.*, the claims of the decree-holders who have, before the realization of assets, made application to the Court for execution of their respective decrees.¹⁸⁹ If the decree being satisfied subsequent to the attachment, the attachment is withdrawn, or if in consequence of the decree-holders' default in proceeding with the application, the application is dismissed, there is no claim outstanding which is enforceable under the attachment.¹⁹⁰ A revival of execution proceedings does not operate as a revival of the attachment, so as to prejudice the rights of the strangers.¹⁹¹

A transfer of immoveable property made with intent to defeat or delay the creditors of the transferee being voidable at the option of any person defeated or delayed, the attaching creditor can impugn the transfer as fraudulent both as plaintiff and as defendant without bringing a suit on behalf of the general body of creditors.¹⁹²

Where an order has been made for the sale of immoveable property, other than a sale in enforcement of a mortgage or charge

Court may authorize alienation.

184. Mahadevappa v. Srinivasa 4 Mad. 417.

185. Dinobundhu v. Jogmaya 29 I. A. 9; 29 Cal. 154; 6 C. W. N. 209.

186. Kristodhone v. Nandarani 35 Cal. 889; 12 C. W. N. 969.

187. Gur Prasad v. Ram Lal 21 All. 20; Mathewson v. Gobardhan 23 Cal. 492; 5 C. W. N. 651; Paramananda v. Mahabeer 20 Mad. 378.

188. Satya Charan v. Madhub Chunder 9 C. W. N. 693.

189. Sorabji v. Govind 16 Bom. 91; see the contrary view taken under Act XIV of 1882 in Manohar v. Ram Autar 25 All. 431; Kunhi v. Makki 23 Mad.

478; Durga Churn v. Monmohini 15 Cal. 771.

190. Umesh Chunder v. Raj Bulhub 8 Cal. 279; 10 C. L. R. 20; Anund Lal v. Julladur 14 Moo. 543; 10 B. L. R. 134; 17 W. R. 313; Abdul Rashid v. Goppo Lal 20 All. 421.

191. Patringa Koer v. Madhavanand Ram 16 C. W. N. 332; 14 C. L. J. 476.

192. Rajani Kumar v. Gour Kishore 35 Cal. 1051; 12 C. W. N. 761; Chidambaram v. Sami Aiyar 30 Mad. 6; Narayam Pattar v. Virangalavan 23 Mad. 184; Hakim Lal v. Mooshahar 31 Cal. 999; 11 C. W. N. 889.

the Court may, on the application of the judgment-debtor, postpone the sale and grant a certificate to the judgment-debtor, authorizing him within a fixed period to raise the decretal amount by mortgage, lease or private sale of the attached property, but all monies payable under such mortgage, lease or sale shall be paid into Court which shall not become absolute until confirmed by the Court.¹⁹³ Where permission to raise the decretal amount has been granted by different Courts, each of which passed a decree against the judgment-debtor, it is enough if the sale is confirmed by either of the courts.¹⁹⁴ But though confirmed by the executing Court, the transfer is not valid, if made by a guardian, unless confirmed under Guardian and Wards Act VIII of 1890, S. 29 by the Court by which the guardian was appointed.¹⁹⁵

There can be no valid sale without an order or decree directing the same. When a Court has passed an order for sale of the property attached and the payment of the proceeds or a sufficient portion thereof to the decree-holder, the sale shall ordinarily be by public auction.¹⁹⁶ A sale of property other than which is directed to be sold is null and void and no title to the property passes thereby. A negotiable instrument or a share in a Corporation may be sold through a broker.¹⁹⁷ Where the Collector represents to the Court that the public sale of the land or a share in the land attached, is objectionable and that satisfaction of the decreee may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction.¹⁹⁸ But it is open to the decreee-holder to show that the proposal of the Collector is not feasible or practicable.¹⁹⁹

When the property is ordered to be sold by public auction, the Court shall give notice to the decreee-holder and the judgment-debtor and draw up a proclamation of sale in the language of the Court, stating the time and place of sale and specifying as fairly and "accurately as possible, among others everything material for a purchaser to know in order to judge of the nature and value of the

Sale in execution shall be by public auction.

Proclamation.

193. O. 21, r. 83 C. P. C. Act of 1908.

195. O. 21, r. r. 64, 65 C. R. C. Act V of 1904.

194. Ananapa v. Bhimrao 19 Bom. 539.

197. O. 21, r. 76 C. P. C. Act V of 1908.

195. Dattaram v. Gangaram 23 Bom. 287; Sarju v. District Judge of Benares 31 All. 378.

198. S. 72 C. P. C. Act V of 1908.
199. Huro Prosad v. Kali Prosad 9 Cal. 290.

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property".²⁰⁰ The proclamation of sale is an invitation to others interested, to come and state their claims which, if preferred, are summarily investigated. "It is also a notice to the intending purchaser and one of the documents from which an intending purchaser, presumably having no special means of knowledge, may reasonably infer what is being sold".²⁰¹ The object of the advertisement is to give notoriety to the proposed sale, so that all persons may understand what it is that is to be sold. No one will bid unless he can know for what he is bidding. The rights of the defendant must necessarily be sacrificed, unless the thing to be sold is made certain. People may refuse to bid or, after successful bidding may claim more than the officer intended to sell, or may have their purchases restricted to less than what was intended to be sold.²⁰² Omission to specify the extent of the property to be sold²⁰³ or the revenue assessed on it,²⁰⁴ or the incumbrances on it,²⁰⁵ is a material irregularity. So, is an incorrect entry in the sale proclamation, misleading the intending bidders.²⁰⁶

Value of property.

The value of the property is not required to be stated in the sale proclamation.²⁰⁷ But whatever material fact *is* stated in the proclamation ("and the value of the property is a very material fact") it shall be stated "as fairly and accurately as possible," for the understatement of value may mislead bidders and prevent them from offering adequate prices at the sale or bidding at all.²⁰⁸ If any objection is taken to the valuation the Court

200. O. 21, r. 66 C. P. C. Act V of 1908.

201. Alukmonee v. Banee 4 Cal. 677 : 3 C. L. R. 473; Barhamdeo v. Rasul Bandi 32 Cal. 691 ; 1 C. L. J. 360.

202. Freeman on Executions § 281.

203. Athappa v. Rama Krishna 21 Mad. 51 ; Arunachellam v. Arunachellam 15 I. A. 171 ; 12 Mad. 19 ; Madarash v. Palaniappa 23 Mad. 628.

204. Olpherts v. Mahabir Pershad 10 I. A. 25 ; 9 Cal. 656; Girdhari Singh v. Hurdeo Narain 3 I. A. 230 ; 26 W. R. 41.

205. Moti Laul v. Bhowani 6 C. W. N. 836.

206. Raj Rani v. Gonesh Prosad 37 Cal. 407.

207. Kashi v. Jamuna 31 Cal. 922.

208. O. 21, r. 66 C. P. C. Act V of 1908 ; Saadatmand v. Phul Kuar 25 I. A. 146 ; 20 All. 412 ; 2 C. W. N. 550 ; Patringa Koer v. Madhavanand Ram 16 C. W. N. 332 ; 14 C. L. J. 476 ; Ramesur v. Sham Krissen 8 C. W. N. 257 ; Ganga Prasad v. Raj Coomar 30 Cal. 617 ; Nando Kumar v. Gobinda Mohan 13 C. L. J. 312 ; Jadoonath v. Aswini Kumar 16 C. L. J. 68 ; Sivasami v. Ratnasami v. 23 Mad. 568 ; Lachman Pershad v. Ganga Pershad 15 C. W. N. 713 ; Pran Singh v. Janardan Singh 14 C. L. J. 541 ; Basanta Kumari v. Ram Kanai 13 C. L. J. 192 ; Kabidanand v. Pirthi Chand 16 C. W. N. 704 ; 14 C. L. J. 346 ; Dhunkelhari v. Mahabir Pershad 31 I. A. 164 ; 34 Cal. 709 ; 11 C. W. N. 739.

must make an enquiry into the value of the property.²⁰⁹ The valuation of the property is intended to prevent the sacrifice of the judgment-debtor's property, and if an objection is taken to the legality of the proceedings before the sale has taken place, the Court is to ensure compliance with the provisions of the Code and not to leave the parties to litigate about the legality of the sale at a subsequent stage of the proceedings.²¹⁰ While the validity of judicial sales should not be allowed to be assailed on technical grounds, the purity of judicial proceedings in execution sale should be secured at least to a reasonable extent, and where the sale resulted in a price, altogether inadequate, such misstatement must be treated as a material irregularity in publishing and conducting the sale.²¹¹ But if the judgment-debtor suffers his property to be sold without any objection to the valuation and acquiesces in such a sale by failing to take any steps to vacate or set it aside or to prevent its confirmation, he is estopped by acquiescence and cannot avoid the sale as against an innocent purchaser, not a party to the suit.²¹²

The order disallowing the judgment-debtor's objection that the value is grossly understated, is not appealable.²¹³ But an appeal need not be preferred against every order in an execution proceeding. The propriety of an interlocutory order may be challenged by an appeal against the final order.²¹⁴

Proclamation of sale shall be made and published, as nearly as may be, in the manner prescribed for the attachment of property. It may also be published in the local official Gazette or newspaper.²¹⁵ Omission to affix a copy of the proclamation,²¹⁶ or to have a drum beaten,²¹⁷ is a material irregularity. When property

Publication
of proclama-
tion.

^{209.} Saurendra Mohan v. Hurruk Chand 12 C. W. N. 542; Sasirama Kumari v. Meherban 13 C. L. J. 243.

^{210.} Sasirama Kumari v. Meherban Khau 13 C. L. J. 243.

^{211.} Pran Singh v. Janardan Singh 14 C. L. J. 541; Basant Kumari v. Ram Kanai 13 C. L. J. 192.

^{212.} Freeman on Executions § 284; Pran Singh v. Janardan Singh 14 C. L. J. 541.

^{213.} Ganga Prasad v. Raj Coomar 30 Cal. 617; Sivagami v. Subrahmani 27 Mad.

259; Deoki Nandan v. Bansi Singh 16

C.W.N. 124; 14 C.L.J. 35; Sakhi Chand

v. Kulanand Singh 14 C. L. J. 607;

Panch Duar v. Mani Raut 16 C. W. N.

970.

^{214.} Chandrabala v. Prabodh 36 Cal. 422; 9 C. L. J. 251.

^{215.} O. 21, r. 67 (1) and (2) C. P. C. Act V of 1908.

^{216.} Nana Kumar v. Golam Chunder 18 Cal. 422.

^{217.} Trimbak v. Nana 10 Bom. 504.

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is divided into lots it shall not be necessary to make a separate proclamation for each lot, unless the Court so directs, or unless proper notice of the sale could not otherwise be given.²¹⁸

Time of sale

Unless the property seized is subject to speedy and natural decay, or the expense of keeping it in custody is likely to exceed its value, no sale shall, without the consent in writing of the judgment-debtors, take place until at least after 30 days in the case of immoveable property and 15 days in the case of moveable property from the date on which a copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale.²¹⁹

The object of the notice of the time and place of sale is essential to give publicity to the sale, to encourage competition by inviting bidding and to prevent the sacrifice of property by realizing the best price. The notice of the sale, being for the benefit of the judgment-debtors, may be waived. His creditors, however, prejudiced by his waiver, may avoid or vacate the sale.²²⁰ A sale ought not to take place at any other time than that fixed by the proclamation, nor at any time prohibited by law. A sale made in violation of this rule, will be vacated or refused confirmation, if the irregularity is suggested in the Court at the proper time. A sale, held at a time on which under the law no sale can properly be made, is void. A sale, held in a day different from that specified in the proclamation, is irregular and is in legal effect a sale held without proclamation and ought in all respects to be treated as such.²²¹ If the proclamation of sale given, is defective in being for too short a time, it cannot be validated by postponing it to a future day.²²²

Sales made at an improper place, are voidable merely and are valid, until set aside.²²³ A sale without first giving proper notice would not be confirmed, if the defect were known to the Court.²²⁴

218. O. 21, r. 67 (3) C. P. C. Act V of 1908; see De Penha v. Jaltpoy 12 Bom. 368; Basanta Kumari v. Ram Kuanai 13 C. L. J. 192; Krishna Prosad v. Moti Chand 40 I. A. 140; 40 Cal. 635 17 C. W. N. 637; 17 C. L. J. 573.

219. O. 21, r. 68 C. P. C. Act V of 1908.

220. Freeman on Executions § 286.

221. Freeman on Executions § 287;

Tasadduk Rasul v. Ahmad Hussain 20 I. A. 176; 21 Cal. 66; Kokil v. Edal Singh 37 Cal. 385; Rang Lal v. Ravaneshwar 38 I. A. 200; 39 Cal. 26; 16 C. W. N. 1; 14 C. L. J. 334; Gangadhar v. Bhikari 16 C. W. N. 227.

222. Freeman on Executions § 288.

223. Freeman on Executions § 289.

224. Freeman on Void Judicial Sales § 28.

To prevent the sacrifice of the property the Court is invested with a very large discretion to adjourn the sale. In the exercise of this discretion it may, and ought, even against the protest of the decree-holder, adjourn the sale for want of bidders or when the bid offered is grossly inadequate and its acceptance must result in a needless sacrifice of the property.²²⁵ A sale is not void, because the officer failed to adjourn it, nor, on the ground that he had adjourned it. But if it is adjourned for a larger period than seven days, a fresh proclamation shall be made, unless the judgment-debtor waives it.²²⁶ The omission to issue a fresh proclamation,²²⁷ or the non-specification of the hour to which a sale is adjourned,²²⁸ is a material irregularity and must be objected to before confirmation.

Every sale shall be stopped, if before the lot is knocked down the debt and costs are tendered to the officer conducting the sale, or proof is given that they have been paid into Court ordering the sale.²²⁹ A mortgagor judgment-debtor is entitled on payment of the debt and costs to stop the sale, even after a final decree for sale has been passed.²³⁰

Where the property, to which a claim has been preferred, or an objection has been made, has been advertised for sale, the Court may postpone the sale, pending the investigation of the claim or objection.²³¹ The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtors to obtain an order to stay execution from the court which passed the decree or the Court having appellate jurisdiction in respect of the decree or the execution thereof.²³² Even if there is no express statutory provision, the Court has an absolute and unfettered discretion as to the granting or refusing a stay and as to the terms upon which it will grant, and will as a rule only grant it, if there are

LECTURE V.

Adjournment
of sale.Stay of Exec-
ution and
sale.

^{225.} Freeman on Executions § 288.

6 C. W. N. 48.

^{226.} O. 21, r. 69 (2) C. P. C. Act V of 1908.

229. O. 21, r. 69 (3) C. P. C. Act V of 1908.

^{227.} Gajrajmati v. Akbar Husain 34 I. A. 37; 29 All. 196; 11 C. W. N. 393; 5 C. L. J. 138; Gopeenath v. Luchmeeput 3 Cal. 542; 1 C. L. R. 349.

230. Bibijan v. Sachi 31 Cal. 863; 8 C. W. N. 684; Misri Lal v. Mithu Lal 28 All. 28.

^{228.} Surmo Moi v. Dakhina Ranjan 24 Cal. 291; Bhikari v. Surja Moni

231. O. 21, r. 58 (2) C. P. C. Act V of 1908.

232. O. 21, r. 26 C. P. C. Act V of 1908.

LECTURE V. special circumstances.²³³ Merely because the defendant is guilty of contempt on account of his failure to carry out the order of the Court within a specified time, does not disentitle him to obtain an order for stay of execution.²³⁴ Where a suit brought by the judgment-debtor is pending in any Court against the decree-holder, the Court may, on such terms, as to security or otherwise as it thinks fit, stay execution of the decree till the disposal of such suit.²³⁵ Execution of a decree passed by a Revenue Court, pending in a Civil Court, may be stayed by the Civil Court.²³⁶

Where the property to be sold is a growing crop which from its nature admits of being stored but has not yet been stored, the sale shall not be held until the crop has been cut or gathered and is ready for storing.²³⁷

Where an order for the sale of immoveable property, other than a sale in enforcement of a mortgage or charge on such property, has been made the Court may propose the sale on such terms and for such periods as it thinks proper, to enable the judgment-debtor to raise the amount of the decree by mortgage, or lease, or private sale of such property or some part thereof or of any other immoveable property of the judgment-debtor.²³⁸

An appeal does not operate as a stay of execution of a decree; but the Court which passed an appealable decree before the appeal is filed and the Appellate Court after the appeal has been filed may, for sufficient cause, order stay of proceedings under a decree or order for execution of a decree, against which or against an order made in execution of which decree, an appeal is pending, provided that the Court is satisfied (a) that substantial loss may result to the party applying for stay of execution, unless the order is made (b) that the application has been made without delay and (c) that security has been given by the applicant for the performance of such decree or order as may ultimately be binding.

233. A. G. v. Emerson (1889) 21 Q. B. D. 56; C. A.; Barker v. Lavery (1885) 14 Q. B. D. 769, C. A.; 51 L. J. Q. B. 241; Nund Kishore v. Ram Golam 40 Cal. 955; 36 C. L. J. 508; Brij Coomtree v. Ramnrick Das 5 C. W. N. 781.

234. Dharmapal v. Krista Deyal 10 C. L. J. 631

235. O. 21, r. 29 Act V of 1908.
236. Jit Lal v. Kamaleswari 16 C. L. J. 555; Ram Lochan v. Newaz Prasad 9 C. L. J. 125.
237. O. 21, r. 75 C. P. C. Act V of 1908.
238. O. 21, r. 53 C. P. C. Act V of 1908.

upon him. The Court may make an *ex parte* order for stay of execution pending the hearing of the application.²³⁹

Whenever it is claimed that a party is entitled to an injunction because of some wrong or irregularity, either in the issuing of process¹ or in some act done or threatened, the first enquiry is whether he has some adequate remedy at law. If the answer be in the affirmative no injunction can properly issue in his behalf.²⁴⁰ The Court acts in aid of the legal right so that the property may be preserved in *statu quo*.²⁴¹ Mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of his decree. One of the circumstances to be taken into account is that if the appellant succeeds, he will in all probability be unable to recover back from the respondent the amount paid under the judgment or order appealed from, or will either lose the benefit of the appeal or otherwise suffer irreparable injury from the execution of the order, *i. e.*, not that there must be no physical possibility of repairing the injury but that the remedy by damages is not such as will in effect, though not in specie, place the parties in the position in which they formerly stood, or that the damages cannot be accurately ascertained.²⁴² "The Court ought not to interfere for the purpose of preventing a party from enforcing a legal claim without securing to itself the means of putting him in the same position in the event of his turning out to be right, as if the Court had not interfered."²⁴³ Nor, will the order be made unless the application has been made without unreasonable delay, and security has been given and notice is given to the decree-holder.²⁴⁴ No security shall be required from the Secretary of State for India in Council, or where the Government has undertaken the defence of the suit for any public officer, sued in respect

Grounds for
stay.

239. O. 41, r.r. 5, 6, 8 C. P. C. Act V of 1908; Pasupati v. Nanda Lal 28 Cal. 734; Tribeni Sahu v. Bhagwat Bux 34 Cal. 1037; 11 C. W. N. 1030; 6 C. L. J. 298 (F. B.); Satya Shankar v. Maharaj Narain 35 All. 119.

240. Freeman on Executions § 435.

241. Jit Lal v. Kamaleswari 16 C. L. J. 555.

242. Barker v. Lavery (1885) 14 Q. B. D. 769, C. A.; 54 C. L. J. Q. B. 241; Adair v. Young (1879) 11 Ch. D. 136;

Wilson v. Church (1879) 12 Ch. D. 454; Brij Coomaree v. Ramnick 5 C. W. N. 781; Gaekwar v. Gandhi 30 I. A. 60; 27 Bom. 344; 7 C. W. N. 393.

243. Per Lord Cottenham, L. C., in Sanxter v. Foster (1841) Cr. & Ph. 302.

244. Multanchand v. Kharsedji 15 Bom. 536; Kali Charan v. Debendra Nath 10 C. L. J. 456; Srinivasa Prasad v. Kesho Prasad 35 Cal. 754; 13 C. L. J. 365.

LECTURE V. of an act alleged to be done by him in his official capacity.²⁴⁵
 — A security bond executed by the judgment-debtor may be enforced in execution proceedings.²⁴⁶

If, before the order of the Appellate Court staying execution of a decree is communicated to the Court executing the decree, the property of the judgment-debtor is sold, the sale is invalid, for the order becomes operative the moment it is made and suspends the power of the lower Court to carry on further the execution-proceedings.²⁴⁷

As a condition of granting the indulgence sought, which will have the effect of interfering for the time being with the enforcement of the decree, the applicant, even if successful, should pay the costs of the application.²⁴⁸ But the rule is not always adhered to.²⁴⁹

The Court may at any time cancel or vary the order.²⁵⁰ An order relating to execution of a decree, includes an order relating to the stay of execution thereof.²⁵¹ An order rejecting an application for stay of execution of a decree, is not "final" within the meaning of S. 109 (a) C. P. C. Act V of 1908.²⁵² The High Court has power to stay execution, although the appeal has been admitted by special leave of His Majesty in Council and even before the admission of the appeal.²⁵³

Injunction
staying sale,

Where the property of any person other than the judgment-debtor is being sold by mistake, arising from a summary decision which is not final and conclusive but liable to be set aside by another Court, e. g., where a claim to attached property is disallowed by the executing Court and the claimant brings a regular suit for establishing his claim to the attached property, the Court, even if it be of the lower grade than the Court executing the decree,

245. O. 41, r. 7 C. P. C. Act V of 1908.

246. Baij Nath v. Sia Ram 17 C. L. J. 267 (F. B.)

247. Hukum Chand v. Kamalanand 33 Cal. 927 ; 3 C. L. J. 67 ; see however Muthukumarasami v. Kuppusami 33 Mad. 71 ; Bisseswar v. Hurro Sundar 1 C. W. N. 226.

248. Chuni Lal v. Anantram 25 Cal. 593.

249. Burdick v. Garrick (1870) 39 L. J. Ch. 661 ; Adair v. Young (1879)

11 Ch. D. 136.

250. Amir Hasan v. Ahmad 9 All. 36.

251. Srinivas Prosad v. Kesho Prosad 14 C. L. J. 489.

252. Srinivasa Prosad v. Kesho Prosad 13 C. L. J. 681.

253. Nityamani v. Madhu Sudan 38 I. A. 74 ; 38 Cal. 335 ; 13 C. L. J. 529 ; Vasudeva Modeliar v. Shadagopa Modeliar 4 C. L. J. 101, P. C. ; Nanda Kishore v. Ram Golam 10 Cal. 955.

may grant a temporary injunction, staying the sale until the disposal of the suit.²⁵⁴

LECTURE V.

The granting of a temporary injunction is a matter of judicial discretion. The Court interferes on the assumption that the party seeking its aid has the legal right which he asserts. He is not required to make out a clear legal title but he must satisfy the Court that he has a fair question to raise as to the existence of the legal right which he sets up and that, on the facts before it, there is a probability that the plaintiff is entitled to relief.²⁵⁵ The Court will consider on which side, in the event of success, will lie the balance of inconvenience, if the injunction does not issue and will not restrain the sale, unless it will result in injuries to the complainant, not susceptible to pecuniary estimation.²⁵⁶ Sometimes property seized upon, is of such special and peculiar value to the owner that he could not by an action at law, recover damages which would be at all adequate to the injury sustained by its conversion. This is the case with relics, heirlooms, mementos and other property having little market value but estimable to the owner. Equity, because of the inadequacy of the legal remedy, will compel such property to be restored to its owner.²⁵⁷ The unlawful ejecting of one from his home or lands is in contemplation of law an irreparable injury.²⁵⁸

Where a sale which is threatened to be made under execution will, if made, cloud the title of the true owner, he may by application to equity prevent the sale from being made. Where a sale, if made, would create a title under which the purchaser in ejectment would recover against the true owner, unless the latter placed his own title in evidence or by some other means established the invalidity of the purchaser's title, then such sale is a cloud on the title of the true owner.²⁵⁹

After the decree is passed, the Court passing the decree has no power to grant a further temporary injunction but the Court of appeal may grant such injunction.²⁶⁰ An order granting or refusing

254. O. 39, r. 1 C. P. C. Act V of 1908; Brojendra v. Ruplall 12 Cal. 515; Amir Dulhin v. Administrator-General 23 Cal. 351; *contra* *in re Chando Bibi* 26 All. 311.

255. Preston v. Luck (1884) 27 Ch. D. 497.

256. Doharty v. Allman (1878) 3 App. Cas. 769; Subba v. Haji Badsha 26 Mad. 168,

257. Freeman on Executions §437.

258. Freeman on Executions § 437 a.

259. Freeman on Executions §438.

260. Gossain Monee v. Guru Pershad

LECTURE V. a temporary injunction is open to appeal, even though it may have been made with jurisdiction.²⁶¹

If the judgment-debtor has sold any part of the property which is subject to the lien of the writ or judgment, equity will protect the alienee, if it can do so without injustice to the creditor. Hence, it will enjoin the latter from selling the property purchased by the former, until after he has sold all other property liable to sale under the writ. If the judgment-debtor has aliened different parcels of land at different times, equity will compel the creditor to sell such parcels inversely to the order of their alienation. But equity will not enjoin the execution-creditor, whereby so doing it will destroy or imperil his rights or prevent him from obtaining that satisfaction of his judgment to which he is both legally and equitably entitled.²⁶²

11 Cal. 146; in *re* Chando Bibi 26
All. 311; Moheeooddeen v. Ahmed 14
W. R. 384.

261. O. 43, r. 1 cl. (r.) C. P. C.
Act V of 1908; Abdul v. Ganpathi 23
Mad. 517.

262. Freeman on Executions § 440.

LECTURE VI.

Compulsory Sales in execution of decrees for money.

(Completion of Sale.)

No officer or other person having any duty to perform in connection with the sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.¹

Nor, shall the holder of a decree, without the express permission of the Court, bid for, or purchase by himself or through another person the property sold.² But assignee of a decree under an oral agreement is not a holder of a decree.³ A decree-holder, however, obtaining leave to bid is in the same position as any other purchaser.⁴ He is not bound to proffer any information regarding the nature of the property sold, nor to disclose all the circumstances within his knowledge bearing on the question of expediency of his being allowed to bid. But if the information be invited from him, or if he professes to give it to the Court with a view to guide its discretion and obtain its approval of the proposed sale, he is then bound to lay before it all the material informations he possesses on that particular subject. It does not, however, follow that because information on some material point or points is offered or is given by a purchaser on request from the Court, it must therefore be given on all others, as to which it is neither offered nor requested and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated.⁵ But if the sanction was obtained by misrepresentation, or by withholding material information, or if the information obtained is misleading, the Court will treat such misrepresentation or withholding as fraud. The condition in the English practice on the necessity of great caution in granting leave to bid, is drawn partly from cases in which

Purchasers at
execution
sales :—
i. Officers.

ii. Decree-
holder.

Leave to bid
puts an end
to disability.

1. O. 21, r. 73 C. P. C. Act V of 1908.

2. O. 21, r. 72 C. P. C. Act V of 1908.

3. Dakshina Mohan v. Basumati 4 C. W. N. 474.

4. Mahomed Meera Ravuthar v. Savasi Vijaya 27 I. A. 17; 23 Mad. 227;

4 C. W. N. 228; Satish Chandra v.

Porter 36 Cal. 226; 13 C. W. N. 18; 9 C. L. J. 244; Mahabir Pershad v. Macnaghten 16 I. A. 197; 16 Cal. 682; Gunga Parsad v. Jawahir Singh 19 Cal. 4; Dakshina Mohan v. Basumati 4 C. W. N. 474.

5. Coaks v. Boswell (1886) 11 App. Cas. 232; 55 L. J. Ch. 761.

LECTURE VI. the applicant is a trustee or solicitor for the debtor, and it is applicable to a system under which the decree-holder has the conduct of the sale; but in India, the Civil Procedure Code throws on the Court the whole responsibility of conducting the sale.⁶ The purity of judicial sales, however, should be secured to a reasonable extent and the decree-holder should not be allowed to employ a benamdar to create the impression that there was a contested sale to a stranger,⁷ for it is intolerable that a decree-holder should be permitted, through the machinery of the Court, to secure for himself, perhaps at a grossly inadequate price, the property of the judgment-debtor.⁸ Nor, should he be allowed to purchase the property in the name of another person, for a price lower than that for which leave to bid was given.⁹ The conduct of the decree-holder in offering bids through a benamdar, considerably in excess of the value he deliberately stated in the proclamation, is calculated to mislead and is consequently fraudulent, for if the stranger-bidders had been aware that the other bids were offered, not by a stranger to the property but by the decree-holder himself, they might have been encouraged to offer higher bids, as they might naturally assume that the decree-holder knew the value of the property and as he did not offer a higher bid, the property would not be worth much more.¹⁰ An order refusing to give a decree-holder leave to bid is not appealable.¹¹

Purchase without leave renders the sale voidable

Where a decree-holder purchases by himself or through another person without permission of the Court, the purchase is not *ipso facto* void but the Court *may*, on the application of the judgment-debtor or any other person whose interests are affected by the sale, set aside the sale.¹² The Court should take into consideration whether the property has been sold at an adequate or inadequate price or substantial injury has resulted from it.¹³ If there were circumstances tending to show that sufficient notice of the sale was not

6. Mahomed Meera Ra nthar v. Savvasi Vijaya 27 I. A. 17; 23 Mad. 227; 4 C. W. N. 228.

7. Pran Singh v. Janardan Singh 14 C. L. J. 541.

8. Patringa Koer v. Madhavanand Ram 16 C. W. N. 332; 11 C. L. J. 476.

9. Sarat Kumari v. Nimai Charan 5 C. W. N. 265.

10. Nanda Kumar v. Gobinda Mohan 13 C. L. J. 312.

11. Jodoonath v. Brojo Mohun 13 Cal. 174; Ko Tho Huyin v. Ma Huin 38 I. A. 126; 38 Cal. 717; 14 C. L. J. 241.

12. O. 21, r. 72 (3) C. P. C. Act V of 1908.

13. Chintamanray v. Vithabai 11 Bom. 588; Mathura v. Nathuni 11 Cal. 731; Thathu v. Kondu 32 Mad. 242; Rukhinee Bullubh v. Brojonath 5 Cal. 308.

given, or that anything was done to prevent intending purchasers from attending the sale, then in the event of the decree-holder's purchasing and specially, if the purchase was for a decidedly inadequate sum, there might be sufficient reason in the interest of sound public policy for presuming a collusion and permitting this presumed collusion to vitiate the sale.¹⁴

The sale must be set aside by an application and a separate suit for the purpose is barred.¹⁵ The written statement filed by the judgment-debtor in a suit by the decree-holder purchaser to recover possession against him and his transferee may be treated as an application to set aside the sale.¹⁶ An application to set aside a sale on the ground of purchase by the decree-holder without the permission of the the Court falls under Art. 181 Sch. I Limitation Act IX of 1908.¹⁷ An order setting aside or refusing to set aside a sale is appealable.¹⁸

Where the property sold is a share of undivided property, moveable or immovable, and two or more persons of whom one is a co-owner respectively bid the same sum, the bid shall be deemed to be the bid of the co-owner.¹⁹ But title to a share in an undivided immovable property, defeasible at the date of sale, is not sufficient to support a claim for pre-emption.²⁰

The agricultural produce may be sold on or near the land on which the crop has grown, at or near the threshing floor, or place for treading out grain, or the like, or fodder stock, or the nearest place of public resort. If a fair price is not offered and if the judgment-debtor applies, the sale may be postponed till the next day or the market day when it shall be completed whatever price may be offered.²¹ Where the crop from its nature admits of being stored, the sale shall not be held until the crop has been cut or gathered and is ready for storing ; but where it does not admit of being stored it may be sold before it is cut and gathered.²² But the

iii. Co-owner.

Made of sale :-
i. Sale of
agricultural
products.

14. Freeman on Void Judicial Sales §32.

15. S. 47 C. P. C. Act V of 1908 ; Genu v. Sakharam 22 Bom. 271 ; Durga v. Balwant 23 All. 478 ; Viraraghava v. Venkata 16 Mad. 287.

16. Thathu v. Kondu 32 Mad. 242 ; Rahim J., dissenting.

17. Chintamani Ray v. Vithabai 11 Bom. 588.

18. O. 43, r. 1(j) C. P. C. Act V of 1908.

19. O. 21 r.r. 77 (3), 88 C. P. C. Act V of 1908.

20. Abdul Ghafur v. Ghulam Husain 35 All. 296.

21. O. 21, r. 74 C. P. C. Act V of 1908.

22. O. 21, r. 75 C. P. C. Act V of 1908.

LECTURE VI. Court may order the sale of any moveable property, being the subject matter of a suit or attached before judgment, which is subject to speedy and natural decay, or which for any other just and sufficient cause, it may be desirable to have sold at once.²³

ii. Sale of negotiable instrument.

A negotiable instrument or a share in a Corporation may be sold through a broker.²⁴

iii. Sale of immoveable property.

Sale of immoveable property may be ordered by any Court other than a Court of Small Causes.²⁵ The sale of properties in contravention of the terms of the decree which directed these properties to be sold after certain other properties is a material irregularity.²⁶ But the judgment-debtor has no absolute right to direct the order of sale of the different parcels of land. As soon however as the decree is fully satisfied, the officer has no further warrant for proceeding and a sale of any parcel made after the amount he is authorised to collect has been realised, is probably void and is certainly voidable at the instance of the injured party. Where several distinct parcels of land are to be sold, each ought to be offered and sold separately, unless it is clear that the union of two or more will augment, rather than decrease, the aggregate proceeds of the sale. If one of the parcels sold is not subject to sale, the sale is void to all the parcels.²⁷

Payment of purchase-money.

In the case of moveable property unless the purchase is made by the decree-holder, the price of each lot shall be paid at the time of sale, or as soon after as the officer conducting the sale directs and in default of payment, the property shall forthwith be resold.²⁸ In the case of immoveable property, the purchaser other than the decree-holder, unless permission to bid was granted on condition that no set-off should be allowed, shall immediately make a deposit of 25 p. c. of the amount of the purchase-money and in default the property shall forthwith be resold.²⁹ Failure to make a deposit of 25 p. c. is a material irregularity.³⁰ A fresh proclamation is not

23. O. 39, r. 6 C.P.C. Act V of 1908.

V of 1908.

24. O. 21, r. 76 C.P.C. Act V of 1908.

29. O. 21, r. r. 72, 84 C.P.C. Act V of 1908; see Hazarimal v. Namdev 32 Bom. 379.

25. O. 21, r. 82 C.P.C. Act V of 1908.

30. Bhim v. Surwan 16 Cal. 33; Van-

26. Manasram v. Nagendranath 16 C.L.J. 557.

kata v. Sama 14 Mad. 227; Ahmad Baksh v. Latlu Prasad 28 All. 238; but see Intizam v. Nardin 5 All. 316; Amir

27. Freeman on Void Judicial Sales §39.

Begum v. Bank of Upper India 30 All. 273.

28. O. 21, r. i. 72, 77 C.P.C. Act

necessary for the resale.³¹ When property is resold on the decree-holder's default to pay the poundage-fee, the deficiency is caused by the purchaser's default.³² The full amount of purchase-money shall be paid into Court before the Court closes on the 15th day from the sale, or if that be a holiday, on the next office day.³³ The purchaser is bound to see that the money reaches the Court in time; the post office is not the agent of the Court.³⁴ If a bid is made and accepted in the life-time of a bidder, it is not annulled or withdrawn by his subsequent death.³⁵

LECTURE VI.

In default of payment, the deposit *may* be forfeited and the property shall be resold after the issue of a fresh proclamation.³⁶ But it is not obligatory upon the Court to forfeit the deposit in every case when it may cause hardship.³⁷ The defaulting purchaser is also liable for any deficiency of price on a resale at the instance of the decree-holder or judgment-debtor.³⁸ But any substantial difference in the description of the property at the sale and resale may relieve him from liability to pay the deficiency of price.³⁹ But decree-holder however is not bound to have the same property resold; he may proceed against any other property of the judgment-debtor, leaving the latter to his remedy against the defaulting purchaser.⁴⁰

But the purchaser cannot be compelled to make payment if the proceedings are so defective in any respect that they cannot divest the title of the judgment-debtor. Every purchaser has a right to suppose that by his purchase he will obtain the title of the defendant in execution. The promise to convey this title is the consideration upon which his bid is made. If the judgment or order of sale is void, or if from any cause he cannot be invested with the title of the judgment-debtor then his bid is without consideration and cannot be enforced.

31. Vallabhan v. Pangunni 12 Mad. 454.

32. Madhu Sudan v. Purna Chandra 9 C. L. J. 115.

33. O. 21, r. 85 C. P. C. Act V of 1908; Sambasiva v. Vyдинадасами 25 Mad. 535; Motiram v. Bhivraj 20 Bom. 745.

34. Ramechandra v. Belya 22 Bom. 115.

35. Freeman on Executions § 293.

36. O. 21, r. r. 86, 87 C. P. C. Act V of 1908.

37. The word "shall" in S. 398 Act XIV of 1882 has been changed into "may if the Court thinks fit". See Sambasiva v. Vyдинадасами 25 Mad. 535.

38. O. 21, r. 71 C. P. C. Act V of 1908.

39. Baijnath v. Moheep 16 Cal. 535.

40. Gour Chunder v. Chunder Coomar S. Cal. 291 : 10 C. L. R. 236.

LECTURE VI.
Sale of moveables not set aside.

No irregularities in publishing or conducting the sale of moveables shall vitiate the sale. Neither the circumstance that the execution was fraudulent against the debtor's creditors, nor that the judgment under which it proceeds was reversed, nor that the execution was carried out, does not at all prejudice the purchaser's title.⁴¹ But any person sustaining any injury may sue for compensation and if the purchaser himself be guilty, for the recovery of specific property or compensation in default.⁴²

Sale of immoveable property set aside.
Payment.

Any person either owning or holding an interest acquired before sale in the immoveable property sold in execution of a decree, provided he is not himself simultaneously prosecuting an application for setting aside the sale on the ground of a material irregularity or fraud in publishing or conducting it, may apply within 30 days from the date of sale to have the sale set aside on his depositing in Court (a) 5 p. c. of the purchase-money and (b) the amount specified in the proclamation of sale less any amount since received, if any, by the decree-holder.⁴³ A formal application is not necessary.⁴⁴ But an application can not be made for setting aside the sale of one of several plots sold separately.⁴⁵ The application cannot impugn the sale on the ground of irregularity in publishing and conducting the sale.⁴⁶ Though the applicant can not simultaneously carry on applications under O. 21 r.r. 89 and 90 C. P. C. Act V of 1908,⁴⁷ the application under r. 90, may proceed after the application under r. 89 has been dismissed.⁴⁸ But the application, though purporting to be made under r. 90, may not really be one under it but under S. 47.⁴⁹

Any person owning or holding a subsisting interest, whether acquired before or after attachment and whether affected by the sale or not, can apply.⁵⁰ But a mere contract for the sale of

41. Emmett v. Thorn (1813) 1 M. &

C. W. N. 703.

S. 425; Pereival v. Stamp (1853) 23, L. J. Ex. 25.

46. Phul Chand v. Nursing 28 Cal. 73.

42. O. 21, r. 78 C. P. C. Act V of 1908.

47. Rajendra Nath v. Nilotan 23

43. O. 21, r. 89 C. P. C. Act V of 1908; Art. 166 Sch. I Limitation Act IX of 1908; see also Ashruf Ali v. Net Lal 23 Cal. 682; compare S. 174 B. T.

Cal. 958; Sital Rai v. Nanda Lal 13 C. W. N. 591; 11 C. L. J. 202.

Act VIII of 1885.

48. Basiruddin v. Faimulla 17 C. W. N. 476.

44. Abdool Latif v. Jadub Chandra

49. Hariher Kanta v. Rama Pandu 33 Bom. 698.

25 Cal. 216.

50. Ramchandra v. Rakhmabai 23

Kripa Nath v. Ram Lakshmi 1

Bom. 450; Mulehand v. Govind 30 Bom.

immoveable property does not of itself create *any interest* in it in favour of the person agreeing to purchase it.⁵¹ Nor, can a person acquiring title to property long before the sale and execution proceedings apply.⁵² Nor, can a person acquiring an interest after the sale apply.⁵³ But the judgment-debtor, where he has sold the property to another after the sale, can apply.⁵⁴ A co-sharer,⁵⁵ a mortgagee,⁵⁶ the benamkar of a person whose property is sold,⁵⁷ a purchaser from the judgment-debtor prior to attachment,⁵⁸ an under-tenant⁵⁹ of the purchaser of a non-transferable holding, though not recognized by the landlord,⁶⁰ can apply.

The deposit of 5 p.c. is intended as a *solutum* to the purchaser, including the decree-holder purchaser, for his trouble and disappointment for the loss of what was perhaps a good bargain.⁶¹ The deposit must be unconditional, and payable to the decree-holder at once;⁶² A deposit of Government Security is not a good deposit.⁶³ Nor, is it a good deposit which is to be retained till the disposal of an application for setting aside an *ex parte* decree.⁶⁴

575 ; Erode v. Puthiedeth 26 Mad. 335 ; Basi Poddar v. Ram Krishna 1 C. W. N. 135 ; Baburam v. Ram Sahai 8 C. L. J. 305 ; Kunja v. Bhoopendra 12 C. W. N. 151 ; see Maganlal v. Doshi 25 Bom. 631 decided under Act XIV of 1882.

51. S. 54 T. P. Act IV of 1882 ; Mahadeo v. Vasudev 23 Bom. 181 ; Horimasji v. Keshav 18 Bom. 13 ; Sabhapathi v. Narayanasami 25 Mad. 555.

52. Mathura Koer v. Bangsildhari 16 C. W. N. 904 ; 15 C. L. J. 83.

53. See *contra* under Act XIV of 1882 in Hazoari Ram v. Badri Ram 1 C. W. N. 279 ; Appaya v. Kunhati 30 Mad. 211 ; Manicka v. Raja Gopala 30 Mad. 507.

54. Ishar Das v. Asaf Ram 34 All. 186.

55. Tuhi Ram v. Izzat Ali 30 All. 192 ; Abdul v. Matiyar 30 Cal. 125.

56. Pares Nath v. Nabogopal 29 Cal. 1 ; 5 C. W. N. 821 ; Srinivasa v. Ayyathurai 21 Mad. 416 ; *contra* Mallikarjunudu v. Linga Murti 26 Mad. 332.

57. Basi Poddar v. Ram Krishna 1 C. W. N. 135 ; Pares Nath v. Nabogopal 29 Cal. 1 ; 5 C. W. N. 821.

58. Aubhoya Dassi v. Pudmo Lochun 22 Cal. 802 ; Benodini v. Peary Mohan 8 C. W. N. 55 ; Kunja Behari v. Sambhu Chandra 8 C. W. N. 232 ; Omar Ali v. Basiruddin 7 C. L. J. 282.

59. Chandra Kumar v. Kamini Kumar 11 C. W. N. 742 ; Narain Mandal v. Sourindra Mohan 32 Cal. 107 ; *contra* Abed Mollah v. Diljan Mollah 29 Cal. 459.

60. Gangadhar v. Midnapore Zemindari Co. 16 C. L. J. 141 ; Brahmadeo v. Ramdown 16 C. L. J. 139 ; Dayamoyi v. Ananda Mohan 18 C. W. N. 971.

61. Tirumal v. Dastaghiri 22 Mad. 286 ; Chundi Charan v. Banke Behari 26 Cal. 449 ; 3 C. W. N. 283 ; Raghubar Dayal v. Jada Nandan 15 C. L. J. 89.

62. Shakoti v. Jotindra Mohon 1 C. W. N. 132 ; Hanooman v. Luchman 8 C. W. N. 355 ; Mathura Koer v. Bangsildhari 16 C. W. N. 904 ; 15 C. L. J. 83.

63. Rahim Baksh v. Nando Lal 14 Cal. 821.

64. Hanooman v. Luchman 8 C. W. N. 355.

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A deposit into Court of the amount of the sale proceeds and not what is specified in the proclamation less the amount since paid to the decree-holder is not enough.⁶⁵ A mistake on the part of an officer of the Court in calculating the amount is not a sufficient plea, unless the officer was charged by the Court to make the calculation and to inform the parties as to the amount to be deposited.⁶⁶

The right of redemption of property from execution-sales is statutory for the benefit of persons having lien against the property acquired from the judgment-debtor but existing in subordination to the execution-sales. The statute creates the right, prescribes the time and method of its exercise and designates the persons entitled to exercise it. A person seeking to redeem must therefore comply with the statute. Both the auction purchaser and the decree-holder must be made parties to the application.⁶⁷

The application must be made within 30 days from the date of sale, *i.e.*, when the property is put up for sale and knocked down to the highest bidder.⁶⁸ The Court cannot extend the time without the consent of the decree-holder, unless the party has been prevented from making the deposit by reason of the action of the Court.⁶⁹ Of course if the Court is closed on or before the last day of the period, the money may be paid on the first day the Court reopens.⁷⁰ Time does not run if the final bid remains for a time unaccepted by the sale officer.⁷¹ If before confirmation but after 30 days from the sale, an application is made alleging fraud then the application

65. Trimbak v. Ramchandra 23 Bom. 723.

396; but see Surendra Mohini v. Amresh Chandra 39 Cal. 687; 16 C. W. N. 570.

66. Chundi Charan v. Banke Behari 26 Cal. 419; 3 C. W. N. 283, distinguishing Makbool v. Bazle Sablam 25 Cal. 609; Ugrah Lall v. Radha Pershad 18 Cal. 255; Abdul Latif v. Jadub Chandra 25 Cal. 216; Fakir v. Beraj Mohini 11 C. W. N. 116.

68. O. 21, r. 92 C. P. C. Act V of 1905; Chowdhry Kesri v. Giani Roy 29 Cal. 626; 6 C. W. N. 776.

67. Ali Gauhar v. Bansidhar 15 All. 407; Kripali Singh v. Paitoo Raut 11 C. L. J. 85; Sharifarn v. Habibuddin 15 C. W. N. 685; 13 C. L. J. 535; Bungshidhar v. Kedar Nath 1 C. W. N. 111; Menazuddi v. Toam Mandal 39 Cal. 881; Nitya Nanda v. Hira Lal 5 C. W. N. 63; Janardhan v. Kali Kristo 23 Cal.

69. Sharifan v. Habibuddin 15 C. W. N. 685; 13 C. L. J. 535; Mahomed Akbar v. Sukhdeo Pande 13 C. L. J. 467; Kabilaso Koer v. Raghunath 18 Cal. 481; Mathura Das v. Bansidhar Singh 16 C. W. N. 904; 15 C. L. J. 83; Raghubar Dayal v. Jadu Nandan 15 C. L. J. 89.

70. Sooshee Bhushan v. Gobind Chunder 18 Cal. 231.

71. Munshi Lal v. Ram Narain 35 All. 65.

can be entertained under S. 18 Limitation Act IX of 1908, if the fraud is made out.⁷² A sale may also be set aside even after it has been confirmed.⁷³ When the property, other than that of the judgment-debtor, is sold, the owner cannot, by making deposit and getting the sale set aside, sue the decree-holder for the recovery of the amount deposited to set aside the sale.⁷⁴ A suit by a mortgagee decree-holder for recovery of money to set aside a sale is not a suit for contribution, payment being governed by Ss. 69 and 70 I. C. Act IX of 1872.⁷⁵ The words, "interested in the payment of money which another is bound to pay," in S. 69 I. C. Act IX of 1872, may include the apprehension of any kind of loss or inconvenience, not merely the actual detriment capable of assessment in money. So, a reversioner, getting a reversal of the sale by payment, is interested in the payment of money.⁷⁶

An order passed on the application is an order determining a question relating to the execution, discharge, or satisfaction of the decree and will be appealable as a decree under S. 47 C. P. C. Act V of 1908 : and if the question is between the parties to the suit or their representatives, it does not cease to be so, merely because the judgment-debtor who is no party to the suit is interested in the result.⁷⁷ The test to be applied to determine whether or not a person is a representative of any of the parties is, whether so far as his interest is concerned he is bound by the decree, i.e., he must be liable to have the decree executed against him or against the property in which he has an interest.⁷⁸ If the auction

72. Gobind Chunder v. Umacharan 14 Cal. 679 ; Golam Abad v. Judhister 30 Cal. 112 ; 7 C. W. N. 305.

73. Pita v. Chunilal 31 Bom. 297.

74. Kunja Behari v. Bhoopendra Kumar 12 C. W. N. 151.

75. Jognarain v. Badri Das 16 C.L.J. 156.

76. Pankhabati v. Nani Lal 19 C. L. J. 72.

77. Murlidhar v. Anandrao 25 Bom. 418 ; Mahomed Akbar v. Sukhdeo Pande 13 C. L. J. 467 ; Srinivasa v. Ayyathorai 21 Mad. 416 ; Joytara v. Praj Krishna 13 C. L. J. 257 ; Raghubar Dayal v. Jadu Nandan 15 C. L. J. 89 ; Phul Chand v. Nurshigh 28 Cal. 73 ; Pita v. Chunilal 31 Bom. 297 ; Harihar

Kant v. Runa Pandu 33 Bom. 698 ; Kripa Nath v. Ram Lakshmi 1 C. W. N. 793 ; Sital Rai v. Nanda Lal 13 C.W.N. 591 ; 11 C. L. J. 202 ; Omar Ali v. Basiruddin 7 C. L. J. 282 ; Azgar Ali v. Asaboddin 9 C. W. N. 134.

78. Ishan Chunder v. Beni Madhub 21 Cal. 62 ; 1 C. W. N. 36 ; Gulzari Lal v. Madho Ran 26 All. 417 ; Ajodhya Roy v. Hardwar Roy 9 C. L. J. 185 ; Azgar Ali v. Asaboddin 9 C. W. N. 131 ; Lalji Mal v. Nand Kishore 19 All. 332 ; Gur Prasad v. Ram Lal 21 All. 20 ; Surendra Narain v. Gopi Sundari 32 Cal. 1031 ; 9 C. W. N. 824 ; Peary Lal v. Chandi Charan 11 C. W. N. 163 ; 5 C. L. J. 80.

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purchaser is not regarded as a representative of the decree-holder no appeal lies.⁷⁹ But the aggrieved party may apply to the High Court for a revision of the order under S. 115 C. P. C. Act V of 1908, though the revisional jurisdiction is discretionary.⁸⁰ An order refusing to restore an application dismissed for default, is appealable but not open to a second appeal.⁸¹ So, an auction-purchaser can appeal against an order made to his prejudice.⁸²

ii. Material irregularity or fraud.

The decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may also apply within 30 days from the date of sale to set aside the sale on the ground of a material irregularity, or fraud in publishing or conducting it.⁸³ But if the irregularities affecting the sale were kept concealed from the judgment-debtor by fraud, the application can be made, even after confirmation of the sale, within 30 days from the date on which the fraud first became known to the applicant.⁸⁴ Proof of fraud antecedent to the sale may have an important bearing on the question whether there was fraud subsequent to the sale sufficient for the purposes of S. 18 Limitation Act IX of 1908.⁸⁵

A purchaser from the judgment-debtor, prior to the attachment cannot apply, for his interest cannot be affected by the sale.⁸⁶ But a purchaser of a tenure prior to attachment sold for its own arrears

79. Amir Rai v. Basdeo Singh 5 C. L. J. 204; Bungshidhar v. Kedar Nath 1 C. W. N. 114; Maganlal v. Doshi 25 Bom. 631; Bashiruddin v. Jhorai Singh 19 All. 140; Anandi Kunwari v. Ajudhia Nath 30 All. 379.

80. Maganlal v. Doshi 23 Bom. 631; Ram Singh v. Salig Ram 28 All. 81.

81. O. 43, r. 1 (j.) C. P. C. Act V of 1908; see Asimoddi v. Pran Mohini 11 C. L. J. 224.

82. Sharitan v. Habibuddin 15 C. W. N. 685; 13 C. L. J. 535; Gopal Singh v. Dular Kuar 2 All. 352; Kanthi Ram v. Bankey Lal 2 All. 396.

83. O. 21, r. 90 C. P. C. Act V of 1908; Art. 166 Sch. I Limitation Act IX of 1908; Lakshmi v. Kuttunni 10 Mad. 57; Sorabji Edulji v. Govind Banaji 16 Bom. 91; Ajudhia Prasad v. Nand Lal 15 All. 315; Chatrapat Singh v.

Jolukul Prosad 20 Cal. 673; Bejoy Singh v. Hukum Chand 29 Cal. 548; Chakrapani v. Dhanji Settu 24 Mad. 311; Asmutunissa v. Ashruff Ali 15 Cal. 488.

84. S. 18 Limitation Act IX of 1908; see also Mohendro Narain v. Gopal Mondul 17 Cal. 769; Golam Ahad v. Judhister 30 Cal. 142; 7 C. W. N. 305; Durga Charan v. Kali Prasanna 26 Cal. 727; 3 C. W. N. 586; Wahid-un-nissa v. Girdhari 27 All. 702; Purna v. Anukul 36 Cal. 654; Gobind Chunder v. Uma Charan 14 Cal. 679.

85. Tookoo Moni v. Dwarka Nath 17 C. W. N. 478; 16 C. L. J. 581; Narayan v. Damodar 16 C. W. N. 894.

86. Subbarayudu v. Pedda Subbarazu 16 Mad. 476; Asmutunissa v. Ashruff Ali 15 Cal. 488.

can, for his interests are affected by the sale.⁸⁷ The beneficial owner is entitled to apply when the property is sold in execution of a decree against the ostensible owner.⁸⁸ The purchaser at a sale in execution of a decree against the unregistered transferee of an occupancy holding, can apply for setting aside a sale in execution of a decree for rent against the registered tenant.⁸⁹ Two attaching creditors of the judgment-debtor, neither of whom was a party to the suit brought by the other, are not the representatives of the judgment-debtors.⁹⁰ A co-sharer cannot apply.⁹¹ An attachment before judgment does not create any interest in the property attached, nor does it give any right to apply.⁹² An application by a co-judgment-debtor to set aside a sale, is maintainable, where similar application by other judgment-debtors have failed.⁹³ When the appointed guardian refused to represent the minor, the mother is competent to apply.⁹⁴

If the act or omission complained of amount to a material irregularity, the sale is not *ipso facto* void but is liable to be set aside. But where the act or omission complained of amounts to an illegality, the sale is void *ab initio*. Thus, the omission to have a guardian *ad litem* appointed of a defendant who, after decree but before sale, has been adjudged to be of unsound mind, is a material irregularity ; but the omission to bring the legal representative of the judgment-debtor on the record before the decree renders the decree a nullity and sale in execution void *ab initio*.⁹⁵ So, when an infant is a necessary party to the suit, the fact of his not being represented will have the same effect as the omission to make him a party.⁹⁶

What is material irregularity.

87. *Aubhoya Dassi v. Pudmo Lochun*
22 Cal. 802.

88. *Abdul Gani v. Dunne* 20 Cal. 418 ; *Shibkumar v. Maidhur* 7 C. L. J. 299 ; *Tummanna v. Mathabala* 19 Mad. 167.

89. *Haradhan v. Grish Chandra* 8 C.L.J. 327 ; *Dayamayi v. Ananda Mohan* 18 C. W. N. 971 ; 20 C. L. J. 52.

90. *Ram Chandra v. Hamiran* 6 C. L. J. 437.

91. *Bisheshar v. Hari Singh* 5 All. 42.

92. *Jogendra Nath v. Monmota Nath* 17 C. W. N. 80 ; 16 C. L. J. 565 ; *Kedar Nath v. Uma Charan* 6 C. W. N. 57 ; *Sewdut Roy v. Sree Canto* 33 Cal. 639 ; 10 C. W. N. 631 ; *Basiram v.*

Kattayani 38 Cal. 448 ; 15 C. W. N. 795.

93. *Jadoo Nath v. Aswini Kumar* 16 C. L. J. 98.

94. *Krishna Pershad v. Moti Chand* 10 I. A. 140 ; 40 Cal. 635 ; 17 C. W. N. 637 ; 17 C. L. J. 573.

95. *Khiarajinal v. Dain* 32 I. A. 23 ; 32 Cal. 296 ; 9 C. W. N. 201 ; 1 C.L.J. 584 ; *Radha Prasad v. Lal Sahab* 17 I. A. 150 ; 13 All. 53 ; *Beni Prasad v. Mukteswar* 21 All. 316 ; *Janardhan v. Ramchandra* 26 Bom. 317 ; *Shrin v. Agha Ali* 18 All. 141.

96. *Rashidunnissa v. Ismail Khan* 36 I. A. 168 ; 31 All. 572 ; 13 C.

LECTURE VI. The irregularity must have been committed in publishing or conducting the sale and not in obtaining a decree or order for sale e.g., where the decree was obtained without service of summons on the judgment-debtor,⁹⁷ or that it was obtained by fraud,⁹⁸ or that the Court had no jurisdiction to sell the property,⁹⁹ or that the execution of the decree was time-barred,¹⁰⁰ or that the property was not saleable.¹⁰¹

Although "an attachment is a step towards the sale of the judgment-debtor's property",¹⁰² it being a measure merely for the protection of the decreee-holder and the purchaser of the property, the omission to attach does not vitiate the sale but it is merely an irregularity, either in publishing or conducting the sale; nor, is it an objection which the judgment-debtor is competent to raise.¹⁰³

All execution sales should be open to free and full competition. Any act which prevents a fair, free and open sale, or which diminishes competition and stifles or chills the sale is contrary to public policy and vitiates the sale. When the purchaser does any act, or makes any false representation the effect of which is to destroy free and full competition and stifle bids by reason of which the property is sold at an undervalue, the sale is invalid. A combination among the intending bidders formed for honest and proper purposes is not fraudulent. But if the object be to obtain the property at a sacrifice by artifice and not to make a fair bargain, or to divide the property among the bidders, the combination is fraudulent.¹⁰⁴ An arrangement between the decreee-holder and a co-sharer

W. N. 1182; 11 Bom. L. R. 1225; Shidapa v. Venkaji 32 Bom. 404; 10 Bom. L. R. 550; Ganga Prasad v. Umlica Churn 14 Cal. 751; Hanuman v. Muhammad Ishaq 28 All. 137; Bhura Mal v. Har Kishen 24 All. 383; Sham Lal v. Ghasita 23 All. 459; Abdul Rab v. Eggar 35 Cal. 182; 12 C. W. N. 160; Naarsing Narain v. Jahi Mistry 15 C. L. J. 3; Purno Chandra v. Bejoy Chand 18 C. L. J. 18.

97. Net Lall v. Kareem 23 Cal. 686.

98. Khagendra v. Prian Nath 29 I. A. 99; 29 Cal. 395; 6 C. W. N. 173.

99. Shirin v. Agha Ali 15 All. 111.

100. Gangathara v. Rathabi 6 Mad. 237.

101. Umel v. Jas Ram 29 All. 612.

Ranchohaibar v. Bechu Bhagat 7 All. 641.

102. Sheodhyan v. Bholanath 21 All. 311.

103. Olpherts v. Mahabir Pershad 10 I. A. 25; 9 Cal. 656; 11 C. L. R. 494; Sasirama Kumari v. Meherban Khan 13 C. L. J. 213; Kishori Mohun v. Mahomed Mujaffar 18 Cal. 188; Tasadduk Rasul v. Ahmad Husain 20 I. A. 176; 21 Cal. 66; Tin Cowri v. Shib Chandra 21 Cal. 639; Peary Lal v. Chandi Charan 11 C. W. N. 163; 5 C. L. J. 80; Sharoda Moyee v. Wooma Moyee 8 W. R. 9; Sivagiri Zamindar v. Tiruvengada 7 Mad. 339.

104. Ambika Prasad v. R. H. Whitwell 6 C. L. J. 111.

of the judgment-debtor that they would not bid against each other but that the latter would get the property from the decree-holder purchaser for the amount of the decree does not amount to fraud.¹⁰⁵ But when the conditions state that the sale is subject to a reserved price, it is illegal to employ a person to bid up to it, unless the right to do so is expressly stipulated for.¹⁰⁶ So, when a sale is advertised or stated to be without reserve, the secret employment of puffers to enhance the bid by persons interested in the proceeds is a fraud on honest bidders and renders the sale voidable at the option of the genuine buyer who has been injuriously affected. Similarly, the conduct of the decree-holder in offering bids through a benamadar considerably in excess of the value set forth in the proclamation is calculated to mislead and is fraudulent.¹⁰⁷ But an agreement with a third person by the decree-holder who has obtained leave to bid at the sale that the former will not bid, though it prevents the best price from being obtained at the sale, does not constitute a fraud.¹⁰⁸

Neither material irregularity, nor fraud in publishing or conducting the sale standing by itself is any ground for setting aside a sale. There must be substantial injury occasioned by the irregularity or fraud.¹⁰⁹ The mere fact that there was a material injury or fraud in publishing or conducting the sale will not justify the Court in assuming that substantial injury has been caused thereby; in other words, the sale will not be set aside, unless it is found that had it not been for the irregularity, the property would have realised a substantially larger price than what it did at the sale.¹¹⁰

Substantial
injury must
be proved.

If fraud is established on the part of either the decree-holder or the auction-purchaser, the sale is vitiated.¹¹¹ The Court shall in all cases disregard any mere irregularity from which no injury to the complaining party is shown and which does not of itself create a presumption of such injury. It is idle to vacate one sale, if it must

105. Satish Chandra v. Porter 36

of 1908.

Cd. 226 ; 13 C.W.N. 18 ; 9 C. L. J. 244.

110. Rang Lal v. Ravaneswar 38 I. A.

106. Gilliat v. Gilliat (1869) L. R. 9

200 ; 39 Cal. 26 ; 16 C. W. N. 1.

Epl. 60.

111. Ambika Prasad v. R. H. Whit-

107. Nanda Kumar v. Gobinda
Mohan 13 C. L. J. 312.

well 6 C. L. J. 111 Adhar Mani v. Mon-

mootha 6 C. W. N. 279 ; Khirole Sundari

108. Mahomed Meera Ravuthar v.
Savvasi Vijaya 27 I. A. 17 ; 23 Mad. 227 ;
1 C. W. N. 228.

v. Jnanendra Nath 6 C. W. N. 283 ;

Radha Madhab v. Kalpatara 17 C. L. J.
209 ; *contra* Abbubaker v. Mohidin
20 Mad. 10.

109. O. 21, r. 90 pro. C. P. C. Act IX

LECTURE VI. be succeeded by another, unless the latter will result more favourably to the complaining party. But when in consequence of the irregularity in conducting and publishing a sale, the property was sold at an inadequate price, the mere fact that the real value of the property did not exceed the amount of the decree and the unsatisfied balance of the decree could not be realized by reason of the law of limitation, or that the irregularities related to one of the lots only, would not justify the Court in dismissing the judgment debtor's application for setting aside the sale.¹¹²

It is not necessary to connect the irregularity or fraud with the inadequacy of price as cause and effect by means of direct evidence. The Court must be satisfied upon the facts proved, *i.e.*, from the nature of the irregularity and the extent of the inadequacy of price that the latter was the inevitable or necessary result of the irregularity complained of.¹¹³ But if the inadequacy of price is so gross as to shock the conscience, or if in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any unconscionable advantage, or if the owner of the property or the party interested in it has been for any reason misled or surprised, the Court will gladly seize upon any irregularity and perhaps magnify its importance in order to find a legal justification for such measures as will clearly subserve the ends of justice. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefitted by the sale to raise the presumption of fraud.¹¹⁴

Irregularities may be waived.

Most of the irregularities on account of which sales are set aside may be waived by the parties interested : and this waiver may be presumed from their apparent acquiescences as well as proved by direct and positive evidence.¹¹⁵ An agreement to waive objection to the irregularities to the sale is valid, when sanctioned by the

112. Shantu Prosad v. Shew Narain 16 C. W. N. 1022; Rajani Nath v. Kunsum Kamini 18 C. W. N. 947.

113. Sheoruttan v. Net Lall 30 Cal. 1; 6 C. W. N. 688; Mahabir Pershad v. Dhanukdhari 31 Cal. 815; 8 C. W. N. 686; Surno Moyi v. Dakhina Ranjan 21 Cal. 291; Venkatasubbaraya v. Zemindar of Karvetinagar 20 Mad. 159; compare the words "unless the applicant proves to the satisfaction of the Court in a

311 Act XIV of 1882 as interpreted to mean by "direct evidence"; Tasadduk Rasul v. Alumed Hussain 20 I. A. 176; 21 Cal. 66, explained in Surno Moyi v. Dakhina Ranjan 21 Cal. 291, but literally followed in Jagat Nath v. Makund 18 All. 37; Shrim v. Agha Ali 18 All. 111.

114. Freeman on Executions § 304*i*; 308.

115. Freeman on Executions § 307.

Court.¹¹⁶ The guardian of a minor appointed by the Court has the right to waive an irregularity for the benefit of the minor.¹¹⁷ The judgment-debtor will be estopped from impeaching the sale if he, knowing an irregularity or fraud, allows the sale to proceed without objection or induces another to become the purchaser at a sale of his property. "It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property, if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold which they know well but of which the execution-creditor or decree-holder might be perfectly ignorant that they should take no notice of that, allow the sale to proceed and then come forward and say the whole proceedings were vitiated."¹¹⁸ But, where the judgment-debtor had previously made an application for adjournment of sale in which there was no occasion to make mention of an irregularity, he would not be estopped from complaining of it afterwards.¹¹⁹ An agreement with the decree-holder to set aside a sale on the judgment-debtor paying a certain sum within a certain time is a valid and enforceable agreement.¹²⁰

When a sale is sought to be vacated, notice must be given to the decree-holder, the judgment-debtor and the purchaser—to the decree-holder because the vacation of the sale will destroy his right to the money realized therefrom; to the judgment-debtor because by vacating the sale the credit which had been entered is cancelled and he becomes again responsible for the amount which through the sale had been paid; to the purchaser because he is deprived of his purchase. Though the decree-holder is a necessary party,¹²¹ a

Notice must
be given to
parties.

116. Thakur Barham v. Ananty Ran 2 C. L. J. 584; Girdhari Singh v. Hurdeo Narain 3 I. A. 230; 26 W. R. 41; Noorul Hossein v. Omatal Fatima 25 W. R. 34; Chandrabala v. Prabodh 36 Cal. 422; 9 C. L. J. 251; Basanta Kumari v. Ram Kanai 13 C. L. J. 192; Preo Lall v. Radhika Prosad 6 C. W. N. 42; Bhikari Misra v. Surja Moni 6 C. W. N. 48; Dhanukdhari v. Nathuni 6 C. L. J. 62; Ambika Prasad v. R. H. Whitwell 6 C. L. J. 111.

117. Bipin Behary v. Jatindra Nath 37 Cal. 897.

118. Arunachellam v. Arunachellam

15 I. A. 171; 12 Mad. 19; Behari Singh v. Mukat Singh 28 All. 273; Uttam Chandra v. Khetra Nath 29 Cal. 577; Olpherts v. Mahabir Pershad 10 I. A. 25; 9 Cal. 656; 11 C. L. R. 491; Manaoram v. Nagendra Nath 16 C. L. J. 557.

119. Ramon v. Kunhayyan 17 Mad. 301; Kabidanand v. Pirthi Chand 16 C. W. N. 704; 11 C. L. J. 316.

120. Harakh Singh v. Saheb Singh 6 C. L. J. 176.

121. Ali Gauhar v. Bansidhar 15 All. 407.

LECTURE VI. — beneficial owner is not, if the benamdar is made a party.¹²² A sale may be set aside by an arrangement with the decree-holder without reference to the purchaser before it has been confirmed by the Court.¹²³

Appeal.

No appeal lies from an order refusing to restore to the file an application dismissed for default.¹²⁴ An order setting aside a sale is open to review.¹²⁵ But an appeal lies against an order dismissing an application for non-appearance of a judgment-debtor.¹²⁶ So, an appeal lies from an order setting aside, or refusing to set aside a sale but no appeal lies from an order passed on appeal.¹²⁷ An appeal also lies to the Privy Council.¹²⁸ When the judgment-debtor seeks to set aside a sale on grounds other than those of irregularity or fraud in publishing and conducting the sale, a second appeal lies.¹²⁹ Where an order setting aside a sale was set aside on review and the sale confirmed, an appeal against the order passed on review preferred after the sale was confirmed, is competent.¹³⁰

The question of a right of appeal does not depend on who may happen to be the appellant.¹³¹ Proceedings to set aside a sale on the ground of irregularity or fraud involve questions relating to the execution, discharge, or satisfaction of the decree within the meaning of S. 47 C. P. C. Act V of 1908. These proceedings must, therefore, be taken by way of application rather than by way of suit, when they are between parties to the suit or their representatives.¹³²

122. Baroda Kanta v. Chunder Kanta 29 Cal. 682; 6 C. W. N. 706.

123. Surendra Mohini v. Amares 39 Cal. 687; 16 C. W. N. 570; Sharifan v. Habibuddin 15 C. W. N. 685; 13 C. L. J. 535.

124. Jung Bahadur v. Mahadeo Prosad 31 Cal. 207; 8 C. W. N. 160.

125. Hakimgir v. Basdeo 17 C. W. N. 631.

126. Gosto Behary v. Hari Mohan 8 C. W. N. 313; Braja Sunder v. Mati Lal 13 C. L. J. 153.

127. S. 104 (2), O. 43, r. 1 Cl. (j) C. P. C. Act V of 1908. But under Act XIV of 1882; an order passed on an application for setting aside a sale on the ground of fraud was open to second appeal as the order under S. 243 (S. 47) had the effect of a decree; Nemai Chund

v. Deno Nath 2 C. W. N. 691; Bhupan Mohan v. Nundo Lal 26 Cal. 324; 3 C. W. N. 399; Hira Lal v. Chundra Kanto 26 Cal. 539; 3 C. W. N. 403.

128. Krishna Prosad v. Moti Chand 40 I. A. 140; 10 Cal. 635; 17 C. W. N. 637; 17 C. L. J. 573.

129. Ramyad Sahu v. Bindeswari 6 C. L. J. 103; Set Umedmal v. Srinath 27 Cal. 810; 4 C. W. N. 692; Chandan v. Ramdeni 31 Cal. 499; Randhani v. Topi Bibi 18 C. L. J. 264.

130. Shamser Ali v. Jagannath 17 C. W. N. 403.

131. Hira Lal v. Chundra Kanto 26 Cal. 539; 3 C. W. N. 403; Kokil Singh v. Edul Singh 31 Cal. 385.

132. Bhim Singh v. Sarwan Singh 16 Cal. 33; Durga Charan v. Kali Prasanna 26 Cal. 727; 3 C. W. N. 586; Golam Ahad v.

If a plaint is filed the Court may treat it as an application.¹³³ But, in other cases the party seeking to set aside the sale may proceed either by an application or by a suit, provided he is entitled to apply; when he is not so entitled he can proceed only by a regular suit. When a sale is sought to be set aside on the ground that the decree was obtained by fraud, a suit is not barred.¹³⁴ A sale held in contravention of O. 34, r. 14 C. P. C. Act V of 1908 is not a nullity and may be set aside by an application before confirmation and even after it, if the applicant had no notice of the sale or confirmation.¹³⁵

When a decree-holder executes any legal process which is invalid for want of jurisdiction, irregularity, or any other reason, he is a trespasser *ab initio* and is liable in an action of trespass without proof of any malice or want of reasonable or probable cause, for a mistake, however honest or inevitable, is no defence for him who intentionally interferes with the person or property of another.¹³⁶ Where damages resulted from acts done under cover of the execution proceedings, either by the decree-holder or at his instigation or suggestion, a separate suit for the recovery of such damages lies against him.¹³⁷ In such a case the plaintiff is bound to prove want of reasonable cause for applying for attachment and malice in fact.¹³⁸

If a suit brought by the judgment-debtor to avoid an execution-sale be barred, his title to the property is not necessarily barred under S. 28 Limitation Act IX of 1908.¹³⁹ The defendant is not debarred from questioning the validity of an execution-sale by way

LECTURE VI.

Decree-holder
a trespasser.

Judhister 30 Cal. 142; 7 C. W. N. 305; Wahidunnissa v. Girdhari 27 All. 702.

Bhaiaji Thakur v. Jharula Das 18 C. W. N. 1029.

133. S. 47(2) C. P. C. Act V of 1908; Madhusudan v. Gobinda Pria 27 Cal. 34; 4 C. W. N. 417; Debendra Nath v. Prasanna Kumar 5 C. L. J. 328.

136. Painter v. Liverpool &c. Gas Light Co. (1836) 3 A. & E. 133.

134. Abdul v. Mahamed 21 Cal. 605; Pran Nath v. Mohesh Chandra 24 Cal. 546; Moti Lall v. Russick Chandra 26 Cal. 326n; 3 C. W. N. 395; Ram Narain v. Shew Bhunjan 27 Cal. 197; Debendra Nath v. Prasanna Kumar 5 C. L. J. 328.

137. Deno Nath v. Ram Kumar 6 C. L. J. 527; Rash Behary v. Wajan 12 B. L. R. 208n; 11 W. R. 516; Shurut Soondari v. Puresh Narain 12 W. R. 85; Mudhun Mohun v. Kanyee Doss 12 B. L. R. 201.

138. Nanjappa v. Ganapathi 35 Mad. 598.

135. Ashutosh v. Behari Lal 35 Cal. 61; 11 C. W. N. 1011; 6 C. L. J. 320.

139. Barada v. Gajendra 13 C. W. N. 557; 9 C. L. J. 383; Rajah of Venkata-giri v. Isakapalli 26 Mad. 410.

LECTURE VI. of defence of his title in a regular suit, although the objection is one within S. 47 C. P. C. Act V of 1908 which he might have raised in the execution proceedings.¹⁴⁰

III. Non-saleable interest.

The purchaser may also apply within 30 days from the date of sale to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold.¹⁴¹ Where the judgment-debtor has no saleable interest at all, or where the property has no existence, or is not at all saleable, or the misdescription of the property in the sale notification materially alters the substance of it and goes to the essence of the contract, there is a total failure of consideration. But it is the duty of the purchaser to satisfy himself prior to the purchase, respecting the title of the judgment-debtor, the sufficiency of the proceedings to transfer it, the quality and value of the property, as if he were purchasing from a private person.¹⁴² The judgment-debtor is under no duty to come forward.¹⁴³ If the judgment-debtor has only a partial interest in the property, however small that interest may be, the purchaser must abide by the bargain and the sale cannot be set aside; nor is the purchaser entitled to a refund of the purchase-money to the extent to which the judgment-debtor had no interest unless there is fraud, as the price paid by the purchaser is not determined by contract but by competition.¹⁴⁴ A purchaser is not confined to this remedy by application; he may proceed by

140. Bhiram Ali v. Gopi Kauth 21 Cal. 355; 1 C. W. N. 396; Chandra-moni v. Halijennessa 9 C. L. J. 164; Durga Charan v. Karamat Khan 7 C. W. N. 607; *contra* Dwarkanath v. Tarini Sankar 34 Cal. 199; 11 C.W.N. 513; 5 C. L. J. 294; Durga Charan v. Kali Prasanna 26 Cal. 727; 3 C. W. N. 586; Murullah v. Burullah 9 C. W. N. 972.

141. O. 21, r. 91 C. P. C. Act V of 1908; Art. 166 Sch. I Limitation Act IX of 1908.

142. Jummal Ali v. Tirbhu Lall 12 W. R. 41; Mahomed Basirulla v. Abdulla 1 B. L. R. App. 95; 15 W. R. 196 n; Sundara Gopalan v. Venkatavarada 17 Mad. 228.

143. Vasanji v. Lalbu 9 Bom. 285; Gurupadipa v. Trapa 14 Bom. 552.

144. Makhanchore v. Nishin Gonai 10 C. L. J. 492; Rustonji Ardesir v. Vinayak Gangadhar 35 Bom. 29; Ram Coomar v. Shushee 9 Cal. 626; Sundara v. Venkatavarada 17 Mad. 228; Ram Kumar v. Ram Gour 37 Cal. 67; 13 C. W. N. 1989; 10 C. L. J. 558; Administrator-General v. Aghore Nath 29 Cal. 420; 6 C. W. N. 873; on appeal 30 Cal. 468; Ram Narain v. Dwarka Nath 27 Cal. 261; 4 C. W. N. 13; Nityanund v. Juggat Chandra 7 C. W. N. 105; Shanto Chander v. Nain Sukh 23 All. 355; Muhammad Rahmatullah v. Bacheho 27 All. 537; Sonaram v. Mohiram 28 Cal. 235; Doyal v. Amrita 29 Cal. 370; Kunhamed v. Chathu 9 Mad. 437; Debi Singh v. Jia Rau 25 All. 214 (F. B.).

a regular suit after the sale has been confirmed to recover the purchase money.¹⁴⁵ But when a sale is sought to be set aside on the ground that the purchaser was induced by misrepresentation or concealment to buy the property for more than its real value, the remedy is by a regular suit.¹⁴⁶

When a sale is set aside, the purchaser is entitled to an order for repayment of purchase-money with or without interest as the Court may direct against any person to whom it has been paid.¹⁴⁷ The order of refund may be executed as a decree even against a decree-holder who has obtained a rateable share.¹⁴⁸ The period of limitation for an application is three years from the accrual of the right¹⁴⁹ but that for a regular suit is six years from the accrual of the right.¹⁵⁰

When the sale is set aside the decree-holder may again apply for execution and time does not run until he is compelled to refund the purchase-money to the purchaser.¹⁵¹

Where no application is made for setting aside a sale or when it is disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute.¹⁵² Confirmation is the formal expression of the judicial sanction of the sale and is therefore essential to the purchaser's title. The sale cannot be confirmed if

LECTURE VI.

Refund of
purchase-
money.

Resale.

Confirmation
of sale.

145. Munna Singh v. Gajadhar Singh 5 All. 577; Kishun Lal v. Muhammad 13 All. 383; Shanto Chander v. Nain Sukh 23 All. 355; Gurshidawa v. Gangayya 22 Bom. 783; Ram Kunar v. Ramgour 37 Cal. 67; 13 C. W. N. 1080; 10 C. L. J. 558; Hari Doyal v. Sheikh Samsuddin 5 C. W. N. 240; Nityanund v. Juggat Chandra 7 C. W. N. 105; Rustomji Ardeshir v. Vinayak Gangan-dhar 35 Bom. 29; Surendra Nath v. Beni Madhab 10 C. W. N. 274; Sivarama v. Rama 8 Mad. 99.

146. Birj Mohun v. Rai Uma Nath 19 I. A. 151; 20 Cal. 8; Durga Sundari v. Gobinda 10 Cal. 368.

147. O. 21, r. 93 C. P. C. Act V of 1908.

148. S. 36 C. P. C. Act. V of 1908; Kishun Lal v. Muhammad 13 All. 383.

149. Art. 181 Sch. I Limitation Act IX of 1908; Girdhari v. Sital Prasad 11 All. 372.

150. Art. 120 Sch. I Limitation Act IX of 1908; Nilakanta v. Imamsahib 16 Mad. 361; but see Ram Kumar v. Ram Gour 37 Cal. 67; 13 C. W. N. 1080; 10 C. L. J. 558; Hanuman v. Hanuman 18 I. A. 158; 19 Cal. 123; Anrita Lal v. Jogendra Lal 40 Cal. 187; Sidheswari v. Mayanand 35 All. 419.

151. Art. 181 Sch. I Limitation Act IX of 1908; Ramneedi v. Lakkiju 30 Mad. 209; 17 M. L. J. 191; Issuree Dassee v. Abdool Khalak 1 Cal. 415; 3 C. L. R. 46; Pyaroo v. Nazir 23 W. R. 183; Torab Ali v. Niruttan 13 Cal. 155; Raghunath Sahay v. Lalji Singh 23 Cal. 397; Rudra Narain v. Pachu 23 Cal. 437; Kalyan-bhai v. Ghanshamlal 5 Bom. 29; Lakhmi Chand v. Ballam Das 17 All. 125; Sasiarma v. Arulanandam 21 Mad. 261.

152. O. 21, r. 92, C. P. C. Act V of 1908.

LECTURE VI. the decree under which the sale was effected has ceased to be a subsisting decree on the date of confirmation,¹⁵³ or if the decree had been satisfied before the sale.¹⁵⁴ If the property is accidentally destroyed after the sale and before confirmation the purchaser will not be compelled to complete the sale. The object of the proceeding for confirmation is to furnish an opportunity for enquiry respecting the acts which have been done under the license to sell and obtain the decision of the Court, whether under all the existing circumstances the sale should be set aside or approved. The approval of the Court must upon principle be taken as an adjudication that such acts have taken place as were necessary to justify the sale. When afterwards some attempt is collaterally made to avoid the sale and involves an enquiry which should have been pursued by the Court before directing the confirmation such enquiry may fairly be regarded as no longer open, for the reason that the matter has already been adjudicated.¹⁵⁵

Confirmation may be refused (1) for irregularities in the proceedings (2) on account of misconduct such as fraud, trick, device on the part of the parties, the officer conducting the sale, the purchaser and even of the stranger, to the proceedings which result or have probably resulted in an unfair and inequitable sale (3) where the bidder has obtained unconscionable advantage and the property has been sold at a grossly inadequate price (4) where an inconsiderable advantage has been obtained over the purchaser by fraud or misconduct of the parties (5) or where the title of the property is such that the Court would refuse to enforce the conduct if the vendor were a private person. But when a party knows of any fact that might constitute an objection to the regularity of the sale which could be remedied before sale if made known and fails to disclose that fact he will not be permitted to make such fact the basis of objection to the confirmation. An order either confirming or setting aside a sale cannot be set aside by a suit by any person against whom such order is made.¹⁵⁶

153. Doyamoyi v. Sarat Chunder 25 Cal. 175; 1 C. W. N. 656; Mul Chand v. Mukta 10 All. 83; Ram Sukhi v. Ram Salai 29 All. 591.

154. Freeman on Executions § 308.

155. Freeman on Void Judicial Sales § 11.

156. O. 21, r. 92 (3) C. P. C. Act V

of 1908; Bhim Singh v. Sorwan Singh 16 Cd. 33; Damodar v. Vinayak 26 Bom. 40; Gajrajmati v. Akbar Hussain 31 I.A. 37; 29 All. 196. The words "on the grounds of such irregularity" in S. 312 Act XIV of 1882 have been omitted; compare Sham Behari v. Rup Kishore 20 All. 579.

On payment of the purchase-money for the sale of moveables the officer holding the sale shall grant a receipt for the same and the sale shall be absolute.¹⁵⁷ Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the purchaser and bearing the date when the sale becomes absolute.¹⁵⁸ The certificate may be granted to the purchaser's assignee or legal representatives.¹⁵⁹ The certificate is not essential to the completeness of the sale : nor does it create title but is merely evidence of title and the purchaser can maintain his title even against a person not a party to the suit after the sale has been confirmed by the Court, though no certificate has been issued to him before the institution of the suit, for the vesting cannot remain in abeyance until the grant of a certificate.¹⁶⁰

No appeal lies against an order refusing to grant a certificate of sale, the question not being one relating to the execution, discharge, or satisfaction of the decree.¹⁶¹ The action of the Court in granting the certificate is ministerial and not judicial. Hence, if the Court fails to issue a sale-certificate, the purchaser may apply for the issue of a sale-certificate at any time.¹⁶² He may also apply for amendment of the certificate, where the description of the property in the certificate differs from that in the proclamation.¹⁶³

All irregularities, though material in the sale of immoveable property, are cured by the certificate of sale, except where the judgment-debtor had no notice of the proceedings.¹⁶⁴ But the irregularities antecedent to the sale are not cured by the certificate of sale.¹⁶⁵

A certificate of sale granted to a purchaser is not required to be registered, although the Court granting a certificate of sale of

157. O. 21, r. 77 (2) C. P. C. Act V of 1908.

158. O. 21, r. 94 C. P. C. Act V of 1908.

159. In re Vinayak Narayan 24 Bom. 120.

160. Krishnaji v. Ganesh 6 Bom. 139; Tantradhari v. Sundar Lal 7 C. L. J. 384; Braja Nath v. Joggewar 9 C. L. J. 346.

161. Jagarnath v. Kartick Nath 7 C. L. J. 436; Bhimal Das v. Ganesha Koer 1 C. W. N. 668; Madhusudan v.

Govinda Pria 27 Cal. 31; 4 C. W. N. 417.

162. Kylasa v. Ramasami 4 Mad. 172; Vithal v. Vithojirav 6 Bom. 586.

163. Bujha Roy v. Ram Kumar 26 Cal. 529; 3 C. W. N. 371; Saddo v. Bansi 23 All. 476; Mammid v. Locke 20 Mad. 487; Nasiruddin v. Saydur Rahman 19 C. L. J. 209.

164. Balkishna v. Masuma 9 I. A. 182; 5 All. 142; 13 C. L. R. 232; Naigar v. Bhaskar 10 Bom. 111.

165. Levina Ashton v. Madhabmoni

LECTURE VI. immovable property is to send a copy of such certificate to the Registering Officer to file the copy in his Book No. 1.¹⁶⁶

Suit against certified purchaser barred.

No suit shall be maintained against any person claiming title under a purchase certified by the Court, i.e., the certified purchaser or any person deriving title through him on the ground that the purchase was made on behalf of another person.¹⁶⁷ The certificate of sale need not have been actually issued to the purchaser at the date of suit.¹⁶⁸ The certified purchaser shall be conclusively deemed to be the real purchaser, the object being merely to discourage benami purchases at execution sales but not to render them illegal.¹⁶⁹ But it contemplates the case of a real sale in execution of a real decree in a real suit.¹⁷⁰

As this provision bars the equitable jurisdiction of the Court, it is construed strictly and not extended beyond its express terms. Hence, if the real owner is actually and honestly in possession and the suit is brought by the certified purchaser against the real owner for any relief based on the certificate, the real owner may resist the suit on the ground that the certified purchaser is only a benamdar.¹⁷¹ But the real owner being in possession cannot obtain a declaration that the certified purchaser was a mere benamdar, for the suit prohibited by this rule is not confined merely to a suit for possession.¹⁷² The mere possession given to the real owner to hold possession cannot alone give or transfer a title from the benamdar to the real owner.¹⁷³ When the suit is based not on the

14 C. W. N. 560; 11 C. L. J. 489.

166. Ss. 17 (XII), 89 (2) I. R. Act XVI of 1908.

167. S. 66 C. P. C. Act V of 1908. The expression "certified purchaser" in S. 317 Act XIV of 1882 was held not to include a person claiming through or under the certified purchaser, such as, an heir or an assignee; Nisakar v. Bairagi 19 C. L. J. 330; Dukhada v. Srimonta 26 Cal. 950; 3 C. W. N. 657; Nokori v. Sarup 5 C. W. N. 311; Theyyavelan v. Kochan 21 Mad. 7; Sibta v. Bhagoli 21 All. 196; *contra* Hari v. Ramchandra 31 Bom. 61.

168. Aldwell v. Habib Bakhsh 5 All. 478.

169. Bodhi Singh v. Gunes Chunder 19 W. R. 356; 12 B. L. R. 317; Bahadur

v. Buhooree 11 Moo. 496; 18 W. R. 157; 10 B. L. R. 159; Lokhee Narain v. Kalipuddo 2 I. A. 154; 23 W. R. 358.

170. Akhil Prodhan v. Maummatha Nath 18 C. L. J. 616.

171. Buhmus v. Buhooree 14 Moo. 493; 18 W. R. 157; 10 B. L. R. 159; Lokhee Narain v. Kallypuddo 2 I. A. 154; 23 W. R. 358; Jan Muhammad v. Habib Bakhsh 1 All. 290; Govinda v. Kishun 28 Cal. 370; Ghaziuddin v. Bishan Dial 27 All. 443; Uncovenanted Service Bank v. Abdul Bari 18 All. 461.

172. Bishan Dial v. Ghazi-ud-din 23 All. 175, commenting on Sasti Churn v. Anopurna 23 Cal. 699.

173. Bishan Dial v. Ghazi-ud-din 23 All. 175, dissenting from Monappa v. Surappa 11 Mad. 231; Saukumari v.

ground that the defendant is a benamdar but on the title acquired by 12 years' possession, such a suit is not barred.¹⁷⁴

The provision does not affect the rights of the parties who by the operation of law are entitled to claim, as part of their common property, an acquisition made by one of them in his own name if made by the use of joint funds. Thus, where the property is purchased by a member of a joint Hindu family with family funds but in his own name,¹⁷⁵ or where the parties stand in the relation of partners and the purchase is made by a partner by the use of partnership funds, or where it is purchased by one of two decree-holders in his own name and the purchase-money is set off against the amount of the joint debt,¹⁷⁶ a suit that the purchase is jointly for the purchaser and other persons is not barred. Nor, is a suit by a third person barred on the ground that the certified purchaser is a mere benamdar and that the property is liable to satisfy his claim against the beneficial owner.¹⁷⁷

Delivery of possession to the purchaser is not essential. A sale is not void because the purchaser did not, at or subsequently to the sale, receive or hold possession of the property purchased.

The moveable property of which actual seizure has been made shall be delivered to the purchaser. But where the property is in possession of some person other than the judgment-debtor, the delivery to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering it to any one except the purchaser. A debt not secured by a negotiable instrument, or a share in a corporation shall be delivered by a written order of the Court, prohibiting the creditor from receiving the debt and the debtor from making payment to any one except the purchaser.¹⁷⁸ In the case of any other property the Court may

Exceptions.

Delivery of possession, actual and symbolical.

(a) Moveables

Narayanan 17 Mad. 282; Kumbalinga v. Ariaputra 18 Mad. 436.

Cal. 294; Subhi Bibi v. Hara Lal 21 Cal. 579; contrary decisions under S. 317

Act XIV of 1882 were in Roma Kurup v. Sridevi 16 Mad. 290; Kollantavida v. Tiruvalil 20 Mad. 362; D. & L. Bank v. Partab Bhaskar 21 All. 29; Kishan Lal v. Garurudhwaja 21 All. 238; Rani Narain v. Mohanian 26 All. 82; Khuda Baksh v. Aziz Alan 27 All. 194; Narain Dei v. Durga Dei 35 All. 138.

174. Karamuddin v. Niamat 19 Cal. 199; Bishan Dial v. Ghazi-ud-din 23 All. 175.

175. Bodh Singh v. Gunes Chunder 19 W. R. 356; 12 B. L. R. 317; Natesa v. Venkataramayyan 6 Mad. 135; Minakshi v. Kalianrama 20 Mad. 349.

176. Achhaibar v. Tapasi 29 All. 557.

177. S. 66 (2) C. P. C. Act V of 1908; see also Kanizak v. Monohur 12

178. O. 21, r. 79 C. P. C. Act V of 1908.

LECTURE VI. make an order vesting it in the purchaser.¹⁷⁹

(b) Immoveable property.

Where the immoveable property is in the possession of the judgment-debtor, or of some person on his behalf, or of some person claiming a title created by the judgment-debtor, subsequent to the attachment, the Court shall, on the application of the purchaser made within 30 days from the date when the sale becomes absolute, order delivery to be made by putting him in actual possession of the property and if necessary, by removing any person who refuses to vacate it.¹⁸⁰ But when the property is in the occupancy of a tenant or other person entitled to occupy it, the Court shall order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property and proclaiming to the occupant by some customary mode that the interest of the judgment-debtor has been transferred to the purchaser.¹⁸¹ The question of delivery of possession is one relating to the "execution, discharge, or satisfaction of the decreee" within the meaning of S. 47 C. P. C. Act V of 1908. Hence, a decree-holder purchaser who does not lose his character of a party to the suit, merely because he happens also to be the purchaser, does not stand on the same footing as a purchaser who is a stranger, so that he cannot proceed like him either by an application under O. 21, r.r. 95,96 C. P. C. Act V of 1908, or by a separate suit for possession.¹⁸² An order passed on an application for delivery of possession is not appealable.¹⁸³ But an order disposing of an objection of the judgment-debtor to an application for delivery of possession by the decreee-holder on the ground that the decreee-holder would not take delivery but reconvey the property to the judgment-debtor is appealable.¹⁸⁴

A purchaser is not precluded from bringing a regular suit for possession, even when his application for possession was rejected as made beyond time.¹⁸⁵ The purchaser of an undivided share

179. O. 21, r. 81 C. P. C. Act V of 1908.

180. O. 21, r. 95 C. P. C. Act V of 1908; Art. 180 Sch. I Indian Limitation Act IX of 1908; see Sultan Sahib v. Chidambaram Chettiar 32 Mad. 136.

181. O. 21, r. 96 C. P. C. Act V of 1908.

182. Bhagwati v. Banwari 31 All. 82; Mahomed Mosraf v. Habil Mia 6 C. L. J. 749; Madhusudan v. Gobinda Pria 27 Cal. 31; 4 C. W. N. 417; Kuter Singh v.

Shib Lal 27 All. 263; Anandi Kunwari v. Ajudhia Nath 30 All. 379; Kasinatha v. Uthumansa 25 Mad. 529; Kattayat v. Raman 26 Mad. 740.

183. Sundhu v. Hussain 28 Mad. 87; Mahomed Mosraf v. Habil Mia 6 C. L. J. 749; Bhimal Das v. Gatesha Koer 1 C. W. N. 658.

184. Hari Charan v. Mon Mohan 18 C. W. N. 27.

185. Seru Mohun v. Bhagoban 9 Cal. 692; Kishori Mohun v. Chunder Nath

cannot apply for possession but must bring a suit for partition.¹⁸⁶ A suit for possession against the judgment-debtor, or a person deriving title from him must be brought within twelve years from the date when the sale becomes absolute, the time during which a proceeding, if any, to set aside the sale has been presented being excluded;¹⁸⁷ but when the judgment-debtor was out of possession at that date, such suit against the third person must be brought within 12 years from the date when the judgment-debtor was first entitled to possession.¹⁸⁸ Both Arts. 137 and 138 apply to a suit by a person claiming through the auction purchaser.¹⁸⁹ But a suit by a transferee from a purchaser to recover possession of a tenure from the landlord falls under Art. 142.¹⁹⁰

Formal or symbolical possession is equivalent to actual possession as between the purchaser and the judgment-debtor and gives a new starting point and limitation runs from the date of the subsequent dispossession and the purchaser has 12 years to bring his suit.¹⁹¹ But a symbolical possession does not break upon the continuity of the combined adverse possession of a third party and the judgment-debtor through whom he claims.¹⁹² Nor, does the symbolical possession prevent limitation running in favour of the judgment-debtor,

14 Cal. 644; Krishna v. Sarasvatula 31 Mad. 177; Kolintavita v. Kolintavita 31 Mad. 37; Iswar Pershad v. Jai Narain 12 Cal. 169; Sheo Narain v. Nur Muhammad 29 All. 463.

186. Yelumalai v. Srinivasa 29 Mad. 291.

187. S. 16, Art. 138 Sch. I Limitation Act IX of 1908.

188. Art. 137 Sch. I Limitation Act IX of 1908; Kishori Mohun v. Chunder Nath 14 Cal. 644; Nasiruddin v. Sayudur Rahman 19 C. L. J. 209; Venkatalingam v. Veerasami 17 Mad. 89; 3 M. L. J. 267; Ahamed Kutti v. Raman Nambudri 25 Mad. 99; Govind v. Gangaji 23 Bom. 246; Ram Lakhan v. Gajadhar 7 A. L. J. 1184; Khiroda Kanta v. Krishnadas 12 C. L. J. 378; Sadashiv v. Narayan 35 Bom. 452; 13 Bom. L. R. 661; Bhagwati v. Banwari 31 All. 82; Namdev v. Ranachandra 18 Bom. 37; Agarchand v. Rakhma 12 Bom. 678.

189. Seru Mohun v. Bhagoban 9 Cal. 602; Arunanga v. Chokalingam 15 Mad. 331; Pulayya v. Ramayya 18 Mad. 144; Sati v. Jogesh 31 Cal. 681; 8 C. W. N. 476; Govind v. Gangaji 23 Bom. 246.

190. Raghu Nath v. Samad 12 C. W. N. 617; 7 C. L. J. 560.

191. Art. 144 Sch. I Limitation Act IX of 1908; Umbicka v. Madhub 4 Cal. 870; 4 C. L. R. 55; Hari Mohan v. Babarali 21 Cal. 715; Mangli Prasad v. Debi Din 19 All. 499; Narain Das v. Lalita Prasad 21 All. 269; Shankar Bisto v. Narsingra 22 Bom. 667; Gossain Dalmar v. Bepin Behary 18 Cal. 520; Uma Shankar v. Kalka Prasad 6 Cal. 75; Juggobandhu v. Ram Chunder 5 Cal. 581; 4 C. L. R. 548; Joggobandhu v. Purnanund 16 Cal. 530; Lakshman v. Moru 16 Bom. 722.

192. Harjivan v. Shivram 19 Bom. 620.

LECTURE VI. where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same.¹⁹³

Resistance. If the purchaser is resisted or obstructed by any person in obtaining possession, actual or constructive, of the property, he may within 30 days from the date of such resistance or obstruction make an application to the Court complaining of such resistance or obstruction.¹⁹⁴

If the resistance or obstruction is made without any just cause by the judgment-debtor, or any person acting at his instigation, the Court may order him to be detained in the civil prison for a term not exceeding 30 days.¹⁹⁵ But, if the resistance or obstruction is made by any other person claiming in good faith to be in possession of the property on his own account, or on account of some person other than the judgment-debtor, the application should be dismissed.¹⁹⁶ A suit by a person against whom such order is passed must be brought within one year from the date of the order.¹⁹⁷ But, failure on his part to avail himself of this speedy remedy does not entitle him to bring a regular suit for possession.¹⁹⁸ The particular resistance or obstruction is the starting point for limitation.¹⁹⁹

Dispossession. When any person is dispossessed by the purchaser, he may, within 30 days from the date of dispossession, make an application to the Court, disputing the right of the purchaser, to be put into possession.²⁰⁰ The claim should be investigated by the Court executing the decree and no question of valuation arises for consideration, although the decision may not be *res judicata* in a subsequent suit.²⁰¹

When the decree has been transferred to a Collector for execution,

193. Mahadev Sakharam v. Janu Nanji 36 Bom. 373 (F. B.) overruling Gopal v. Krishnarao 25 Bom. 275 and Mahadeo v. Parashram 25 Bom. 358.

194. O. 21, r. 97 Act V of 1908 ; Art. 167 Sch. I Limitation Act IX of 1908 ; Mancharam v. Fakirchand 25 Bom. 478 ; Brajabala v. Gurudas 33 Cal. 487 ; 3 C. L. J. 293.

195. S. 74, O. 21, r. 98 C. P. C. Act V of 1908.

196. O. 21, r. 99 C. P. C. Act V of 1908.

197. Art. 11A Sch. I Limitation Act IX of 1908.

198. Balvant v. Babaji 8 Bom. 602 ; Kesri v. Abdul Hassan 26 All. 365 ; Muttia v. Appasani 13 Mad. 504 ; Shoteenath v. Obhoy Nund 5 Cal. 331.

199. Ramasekara v. Dharmaraya 5 Mad. 113 ; Narain Das v. Hazari Lal 18 All. 233 ; Baranagore Jute Factory v. Raj Kumar 13 C. W. N. 724.

200. O. 21, r. 100 Act V of 1908 : Art. 165 Sch. I Limitation Act IX of 1908 ; see Ratnam Ayyar v. Krishna Doss 21 Mad. 491 ; Har Din v. Lachman Singh 25 All. 343.

201. Kadambini v. Deyaram 11 C.L.J. 478.

the person wrongly ousted should apply to the Collector.²⁰² When mere symbolical possession is delivered, the person in constructive possession cannot be said to be "dispossessed," unless the tenant is ousted from the property by the delivery of actual possession to the purchaser.²⁰³ If the applicant was in possession of the property on his own account, or on account of some person other than the judgment-debtor, the Court shall direct that the applicant be put into possession of it.²⁰⁴ But no question of title can be investigated in such a proceeding.²⁰⁵ When a claim under O. 21 r. 58 C. P. C. Act V of 1908 has been dismissed and a regular suit has not been brought, the claimant cannot object to the delivery of possession.²⁰⁶ A member of a joint Hindu family cannot be said to be in possession of any particular portion of the joint property on his own account.²⁰⁷ Sons living with their father on the property from which they are dispossessed are not third parties and are bound by the proceedings against them.²⁰⁸ But a claimant who was in possession in respect of his own interest, though joint with the judgment-debtor, is entitled to be restored to joint possession with the purchaser.²⁰⁹

An order passed on an application complaining of resistance, or obstruction, or dispossession is final; but any person, other than the judgment-debtor, may, within one year from the date of the order, institute a suit to establish the right which he claims to the present possession of the property and he is not required to have the adverse order set aside.²¹⁰ But, if the order is not made after investigation, or where the Court declines to make an enquiry and refers the parties to a separate suit, or when the application is dismissed for default, the period of one year's limitation will not apply.²¹¹ An

202. Ragho Chandrarao v. Hammati Chandrarao 37 Bom. 488.

203. Ibrahim v. Ramjodu 30 Cal. 710; Kocherlakota v. Vadrevu 27 Mad. 262; Brajabala v. Gurudas 33 Cal. 487; 3 C. L. J. 293; Chidambara v. Rama-samy 27 Mad. 67; Kisori Lal v. Shib Lall 1 C. W. N. 343.

204. O. 21, r. 101 C. P. C. Act V of 1908.

205. Kedar Nath v. Saday Chandra 19 C. L. J. 13.

206. Sankar Nath v. Madan Mohan 14 C. W. N. 298; 11 C. L. J. 61.

207. Cooverji v. Dewsay 17 Bom. 718.

208. Pandharinath v. Mahabubkhan 21 Bom. 98.

209. Radha Gobinda v. Roghu Nath 18 C. W. N. 695; 18 C. L. J. 138.

210. O. 21, r. 103 C. P. C. Act V of 1908; Art. 11 A Sch. I Limitation Act IX of 1908; see Maula Buksh v. Bhaba Sundari 19 C. L. J. 187.

211. Rahimbux v. Abdul Kader 32 Cal. 517; Kunj Behari v. Kandh 6 C. L. J. 362; Sarat Chandra v. Torini Prasad 34 Cal. 491; 11 C. W. N. 187; Rash Behary

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application for a rehearing of execution proceedings is maintainable.²¹² But an order passed *ex parte* cannot be set aside under O. 9, r. 13 C. P. C. Act V of 1908.²¹³ Dispossession by a purchaser is not "otherwise than in due course of law;" so a suit under S. 9 S. R. Act I 1877 cannot be maintained.²¹⁴ But, if he does not proceed under O. 21 r. 96 C. P. C. Act V of 1908, the dispossession is not "in due course of law."²¹⁵

Suit to set aside a sale

A suit to set aside a sale in execution of a decree must be brought within one year from the date when the sale would be confirmed, or would otherwise have become final and conclusive, had no such suit been brought.²¹⁶ But, where the sale was in its inception void, it is not necessary to have it set aside, as where the plaintiff seeks to set aside the sale on the ground that he is not bound by the decree under which the property purported to have been sold,²¹⁷ or where the legal representative of the deceased judgment-debtor has been proceeded against without any notice being given him,²¹⁸ or where the sale is effected of the property of the persons who were not parties to the suit or proceedings or properly represented in the records,²¹⁹ or where the property sold is wholly outside the territorial jurisdiction assigned to the Court,²²⁰ or where a sale has

v. Buddun 12 C. L. R. 550; Meerudin v. Rahisa 27 Mad. 25.

212. Safdar Ali v. Kishun Lal 12 C. L. J. 6.

213. Hari Charan v. Manmatha Nath 41 Cal. 1; 18 C. W. N. 343.

214. Kamini Sundari v. Sabed Sheikh 14 C. W. N. 403; Haran Chandra v. Madan Mohan 15 C. W. N. 956.

215. Muluk Patooni v. Bharat Chandra 12 C. W. N. 694.

216. Art. 12 (a) Sch. I Limitation Act IX of 1908.

217. Parekh v. Bai Vakhat 11 Bom. 119; Gundar v. Habibamissa 7 B. L. R. 235; 15 W. R. 311.

218. Nazar Ali v. Kedar Nath 19 All. 398; Jwala v. Masiat 26 All. 346.

219. Erava v. Sidramappa 21 Bom. 421 (F. B.)

220. Bennett v. Hamill 1896 2 Sch.

& Lef. 566; Jones v. Barnett (1899) 1 Ch. 611; (1900) 1 Ch. 370; Purna Chandra v. Bejoy Chand 18 C. L. J. 18; Khiarajmal v. Daim 32 I. A. 23; 32 Cal. 296; 9 C. W. N. 201; 1 C. L. J. 584; 7 Bom. L. R. 1; Rashid-un-nissa v. Ismail Khan 36 I. A. 168; 31 All. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 11 Bom. L. R. 1225; Narsingh Narain v. Jahi Mistry 15 C. L. J. 3; Venkata v. Subhamma 4 Mad. 178; Narayana Kothan v. Kalianasundaram 19 Mad. 219; Daji Hinat v. Dhirajram 12 Bom. 18; Vishnu v. Ram Chandra 11 Bom. 130; Hakimullah v. Nabin Chandra 18 C. W. N. 1329; 20 C. L. J. 291; Narendra v. Jogendra 20 C. L. J. 469.

221. Dakhina Churn v. Bilash Chunder 18 Cal. 526; Prem Chand v. Mokhada 17 Cal. 699 (F. B.); Sadugopa v. Jamuna 5 Mad. 51; Balwant v. Muhammad 15 All.

taken place on the basis of a satisfied decree, the satisfaction of which has been certified to the Court,²²² or where the execution proceedings were fraudulent and the person affected by the irregularity, had no notice of the proceedings and was thus prevented from attacking their legality.²²³

When any portion of the proceeds of a sale in execution has been applied in any way for the benefit of a minor, the sale will not be set aside, unless such sum which has been so applied, be refunded by the minor.²²⁴

An application for refund of money realized in execution of an *ex parte* decree, subsequently set aside, or in excess of the amount of decree subsequently amended, should be made within 3 years from the date when the *ex parte* decree is set aside in the former case, or when the decree is amended in the latter.²²⁵

When a sale is set aside, the Court's power of restitution is not confined merely to S. 144 C. P. C. Act V of 1908; it has an inherent power to restore possession with mesne profits.²²⁶ The plaintiff is also entitled to bring a suit for mesne profits of such lands within 6 years.²²⁷

The property shall be deemed to have vested in the purchaser from the time when the sale takes place and not when it becomes absolute and the certificate is granted to the purchaser.²²⁸

Effect of setting aside a sale.

(a) Refund of purchase-money.

(b) Restitution.

Vesting of property.

224; *Obhoy Churn v. Golam Ali* 7 Cal. 410; 9 C. L. R. 361; *Ram Lall v. Bama Sundari* 12 Cal. 307; *Raman v. Chandan* 15 Mad. 219; *Kadar Hussain v. Hussain Saheb* 20 Mad. 118; 7 M. L. J. 52.

222. *Mothura Mohum v. Akhoy Kumar* 15 Cal. 557; *Vellappa v. Ramchandra* 21 Bom. 463; *Pat Dasi v. Sharup* 14 Cal. 376; *Ram Gopal v. Rajan* 6 C. L. J. 43; *Janakdhari v. Gossain Lal* 37 Cal. 107; 13 C. W. N. 710; 11 C. L. J. 254; *Nandan Misser v. Harakh Narain* 14 C. W. N. 607; 11 C. L. J. 266.

223. *Levinia Ashton v. Madhabmoni* 14 C. W. N. 560; 11 C. L. J. 489; *Hungsha Majillya v. Tincowri* 8 C. W. N. 230; *Khirode Sundari v. Jnanendra Nath* 6 C. W. N. 283.

224. *Dyal Singh v. Ram Buddun* 17 W. R. C. R. 454; *Vishnu v. Ram Chunder* 11 Bom. 130; *Hannir Singh v.*

Zakia 1 All. 57; *Daji Himat v. Dhirajram* 12 Bom. 18; *Jatha v. Venkatappa* 5 Bom. 14; *Jungee Lall v. Sham Lall* 20 W. R. 120.

225. Art. 181 Sch. I Limitation Act IX of 1908; *Harish Chandra v. Chandra Mohan* 28 Cal. 113; *Mula Raj v. Debi Dihal* 7 All. 371.

226. *Beni Madho v. Pran Singh* 15 C. L. J. 157; *Prag Narain v. Kamakhya Singh* 36 I. A. 197; 31 All. 551; 14 C. W. N. 55; 10 C. L. J. 257; *Amirannessa v. Kurumannessa* 18 C. W. N. 1299.

227. Art. 120 Sch. I Limitation Act IX of 1908; *F. H. Holloway v. Guneshwar Singh* 3 C. L. J. 182.

228. S. 65 C. P. C. Act V of 1908. Under S. 316 Act XIV of 1882, the vesting took place from the "date of the certificate"; *Prem Chand v. Purnima Dasi* 15 Cal. 546; *Amir Kazim v. Dau-*

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The purchaser acquires a good title only against the person bound by the decree and not against a stranger.²²⁹ The general principle is that the title of a purchaser, not a party to the suit, cannot be impaired by shewing any mere error, or irregularity, or fraud in the proceedings in which he did not participate and of which he had no notice.²³⁰ He cannot be held to have had notice of the irregularities that had occurred in bringing about the sale. "It would be extremely dangerous to impress upon the purchaser under decrees that which had escaped the vigilance of the Court, its officers and of the Bar would form a sufficient ground to set aside a sale."²³¹ It is always necessary for an intending purchaser to enquire who are the parties having title to, interests in, or lien upon, the property and whether they have been brought within the jurisdiction of the Court so that its judgment, decree, or order directing, or authorizing the sales of the property, is binding upon them to the extent that the sale may transfer their title, interest, or lien, or estop them from asserting it against him. It is further essential to enquire whether all these parties have been brought before the Court in the capacity in which they are entitled to, or claim some estate, lien, or interest.²³²

When, therefore, property sold in execution of a decree under the order of a competent Court, is purchased by a stranger *bona fide* and for value and the sale is confirmed, the sale cannot be set aside on the ground that the judgment-debtor had a cross judgment of a higher amount,²³³ or that there was any irregularity or defect of procedure not discovered by the Court or its officers, nor apparent on the face of the records,²³⁴ or that the property was not liable to attachment and sale,²³⁵ or that the execution of the decree was

bari Mal 21 All. 175; Adhar Chunder v. Aghore Nath 2 C. W. N. 589; Shiam Lal v. Nathe Lal 33 All. 63.

229. Umesh Chunder v. Zahur Fatima 17 I. A. 201; 18 Cal. 161.

230. Malkarjun v. Narhari 27 I. A. 216; 25 Bom. 337; 5 C. W. N. 10; 10 M. L. J. 368.

231. Per Sir Edward Sugden L. C., in Bowen v. Evans (1841) 1 Jo. & Lat. 178 cited in Narayana Kothan v. Kalianasundaram 19 Mad. 219.

232. Freeman on Void Judicial Sales

§ 3.

233. Rewa Mahlon v. Ram Kishen 13 I. A. 106; 14 Cal. 18.

234. Balkishna v. Masmina 9 I. A. 183; 5 All. 112; 13 C. L. R. 232;

Rangasami v. Periasami 17 Mad. 58; Narayana Kothan v. Kalianasundaram 19 Mad. 219; Yelleppa v. Ram Chandra 21 Bom. 163; Paresh Nath v. Hari Charan 38 Cal. 622; 15 C. W. N. 875; 14 C. L. J. 300.

235. Pandurang v. Krishnaji 28 Bom. 125.

fraudulent or was barred by limitation,²³⁶ or that the decree was one which the Court ought not to have passed,²³⁷ or that the summons was not duly served,²³⁸ or that a wrong person was substituted in the place of the deceased judgment-debtor.²³⁹ But if the Court has no jurisdiction to sell, the sale is void and ineffectual to pass any title, even to a *bona fide* purchaser for value without notice.

A *bona fide* purchaser who is a stranger to the decree is under no obligation to look behind the decree, to see whether it has been rightly made and does not lose his title to the property by the reversal or modification of the decree subsequent to the confirmation of sale; but the judgment-debtor, whose property is sold, must seek redress from the decree-holder.²⁴⁰ Under any other rule confidence in such sale would be entirely dissipated and doubts would be introduced in sales under the authority of the Court and the final result would be that the creditors would become the purchasers on their own terms, or the property would be sold at a grossly inadequate price. If, however, the property belongs to an infant, it is for the Court to say in each case, whether it will be in accordance with justice, equity and good conscience that the sale ought to be set aside or not.²⁴¹

Reversal of decree does not affect a purchaser other than the decree-holder.

But where the purchaser is the decree-holder, he is bound to restore the property back to the judgment-debtor upon the reversal of the decree, for the law will not permit him to be ignorant of the

236. Saroda Churn v. Mahomed 11 Cal. 376 ; Radha Madhab v. Kalpataru 17 C. L. J. 209 ; Bishnu Chand v. Bijoy Chand 13 C. L. J. 588.

237. Kaunsilla v. Chander Sen 22 All. 377 ; Kudratullah v. Kubra Begam 23 All. 25.

238. Paresh Nath v. Hari Charan 38 Cal. 622 ; 15 C. W. N. 875 ; 14 C. L. J. 300.

239. Malkarjun v. Narhari 27 I. A. 216 ; 25 Bom. 337 ; 5 C. W. N. 10 ; 10 M. L. J. 368.

240. Jan Ali v. Jan Ali 1 B. L. R. A. C. 56 ; 10 W. R. C. R. 154 ; Jungee Lall v. Sham Lall 20 W. R. C. R. 120 ; Debi Dutt v. Subodra 2 Cal. 283 ; 25 W. R. 449 ; Kaunsilla v. Chander Sen

22 All. 377 ; Hargu Lall v. Gobinda Rai 19 All. 541 ; Girish Chunder v. Miller

3 C. L. R. 17 ; Zainulabdin v. Ashgar 15 I. A. 12 ; 10 All. 166 ; Dorasami v. Annasami 23 Mad. 306 ; Ram

Logan v. Bhawani Ojha 14 Cal. 9 ; Mukhoda Dasi v. Gopal Chunder 26 Cal.

734 ; 3 C. W. N. 766 ; Chandau v. Ramdeni 31 Cal. 499 ; Syed Nathadu v. Nallu Mudaly 27 Mad. 98 ; Shivlal v.

Shambhu Prasad 29 Bom. 435 ; Set Umed v. Srinath 27 Cal. 810 ; 4 C. W. N. 692 ; Janakdhari v. Gossain Lal 37 Cal.

107 ; 13 C. W. N. 710 ; 11 C. L. J. 254 ; Paresh Nath v. Hari Charan 38 Cal.

622 ; 15 C. W. N. 875 ; 14 C. L. J. 300.

241. Abdool Hye v. Nawab Raj 9 W. R. C. R. 196 ; B. L. R. (F. B.) 911.

LECTURE VI. facts and proceedings relating to the suit and execution proceedings.²⁴² The principle is that the Court will not permit an injustice to be done by reason of an erroneous order which has been reversed and will restore the parties to the position which they would otherwise have occupied.²⁴³ But where the property sold in execution of a decree was brought by the decree-holder, and resold by him to a *bona fide* purchaser for value, such purchaser will get a good title, though the decreee may be subsequently reversed.²⁴⁴ Similarly, although the original purchaser has himself been guilty of devices, or had notice of such devices practised by others, he can transmit a valid unimpeachable title to a vendee for value in good faith and without notice.²⁴⁵

Purchaser's title.

What passes to a purchaser at a sale in execution of a decree for money is the right, title and interest of the judgment-debtor, whatever that interest may be, *i.e.*, the purchaser buys the property with all risks and defects in the judgment-debtor's title.²⁴⁶ He obtains only the precise interest and no more of the execution-debtor, since the property is sold with all the charges and incumbrances, legal and equitable, to which it was subject in the debtor's hands.²⁴⁷ To determine the nature and extent of the judgment-debtor's right, title and interest in the property sold, the test is, as stated by Lord Watson in the course of the argument in *Pettachi Chettiar v. Chinnatambi*,²⁴⁸ what did the Court intend to sell and what did the purchaser understand that he bought? These are questions of fact, or rather, of mixed law and fact and must be determined with reference to the circumstances under which the sale took

242. *Khiarajmal v. Daim* 32 I. A. 23; 32 Cal. 296; 9 C. W. N. 201; 1 C. L. J. 584; *Mina Kumari v. Jagat Sattani* 10 Cal. 220; *Zainulabdin v. Asghar* 15 I. A. 12; 10 All. 166; *Mukhoda Dasi v. Gopal Chunder* 26 Cal. 731; 3 C. W. N. 766; *Set Umed v. Srinath* 27 Cal. 810; 4 C. W. N. 692.

243. *Beni Madho v. Pran Singh* 15 C. L. J. 187; *Prag Narain v. Kamakhia Singh* 36 I. A. 197; 31 All. 551; 14 C. W. N. 55; 10 C. L. J. 257; *Dorasami v. Annasani* 23 Mad. 306.

244. *Ismail Rowther v. Rajab Rowther* 30 Mad. 295; *Marimuthu v. Subba-*

raya 13 M. L. J. 231.

245. *Freeman on Void Judicial Sales* § 41.

246. *Dorab Ally v. Executors of Khajali Moheeoodeen* 5 I. A. 116; 3 Cal. 806; *Shanto Chander v. Nain Sukh* 23 All. 355; *Sundara v. Venkata* 17 Mad. 228; *Sobhagchand v. Bhaichand* 6 Bom. 193.

247. *Wickham v. New Brunswick &c. Rail. Co.* (1865) 1. R. 1 P. C. 64.

248. 14 I. A. 81; 10 Mad. 241; see also *Simbhunath v. Golap Singh* 14 I. A. 77; 11 Cal. 572; *Mohabir v. Moheswar* 17 I. A. 11; 17 Cal. 584; *Tinamappa v. Narsinha* 37 Bom. 631.

place and the true meaning of the decree and the proceeding leading up to the sale.²⁴⁹

It is necessary to see in each case what was actually sold.²⁵⁰ A sale-certificate is not conclusive as to the property sold.²⁵¹ What was offered for sale and bid for, is determined by the order of the Court and the proclamation. Where an existing property is accurately described in the proclamation, a certificate of sale cannot be issued in respect of a different property. If by mistake wrong property was attached and an order made for sale, the only course left open to the deeree-holder is to commence the proceedings over again.²⁵² It is the duty of the purchaser to see that the certificate conveys what he supposed to have purchased and if there be any defect, it may be amended.²⁵³ In cases of doubt the whole execution proceedings may be looked at.²⁵⁴ A sale-certificate and an order for sale must be construed with reference to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place, as well as the nature and scope of the proceeding leading up to it.²⁵⁵ When there is a difference between the proclamation of sale and the sale-certificate, the particulars set forth in the proclamation must be taken as of superior authority.²⁵⁶ Documents in other judicial proceedings tending to shew that a mistake has been made in drawing up the proclamation are irrelevant.²⁵⁷ The purchaser takes the property as defined by the

249. Abdul Aziz v. Appayasami 31 I. A. 1; 27 Mad. 131; 8 C. W. N. 186; Tara Lal v. Sarobar Singh 27 I. A. 33; 27 Cal. 407; 4 C. W. N. 533; Barhamdeo v. Ram Narain 19 C. L. J. 182; Akhoy Kumar v. Bejoy Chand 29 Cal. 813.

250. Bissessur Lall v. Luchmessur 6 I. A. 233; 11 B. L. R. 121; 19 W. R. 351; Devji v. Sambhu 24 Bom. 135; Jairam v. Joma Kondia 11 Bom. 361; General Manager v. Ramapat 14 Moo. 605; 17 W. R. 459.

251. Balvant v. Hira Chand 27 Bom. 334; Shantappa v. Subrao 18 Bom. 175; Ram Chandra v. Kassim 16 Mad. 207; Ambala v. Naduvakat 6 Mad. 325.

252. Thakur Barmha v. Jiban Ram 18 C. W. N. 313; 19 C. L. J. 161.

253. Bujha Roy v. Ram Kumar 26 Cal. 529; 3 C. W. N. 374; Saddo Kunwar v. Bansi Dhar 23 All. 476; Mammod v. Locke 20 Mad. 487; Nasiruddin v. Sayuder Rahman 19 C. L. J. 209.

254. Mohabir v. Moheswar 17 I. A. 11 at p. 14; 17 Cal. 584; Ananda Kumar v. Hari Dass 27 Cal. 545; Nitayi Behari v. Hari Govinda 26 Cal. 677; Natesayyan v. Narasimmayyar 13 Mad. 480.

255. Akhoy Kumar v. Bejoy Chand 29 Cal. 813; Jotindro Mohan v. Jogul Kishore 7 Cal. 357; 9 C. L. R. 57; Gocool Bagdi v. Debendra Nath 14 C. L. J. 136.

256. Uma Churn v. Gobind Chunder 1 C. L. R. 460.

257. Thakur Barmha v. Jiban Ram 18 C. W. N. 313; 19 C. L. J. 161.

LECTURE VI. boundaries in preference to the area in the sale-certificate.²⁵⁸

The test to be applied to determine the exact interest which passes at a sale in execution of a decree against a Hindu widow, or a qualified owner, is, whether the suit in which the sale was directed was one brought against the defendant upon a cause of action, personal to herself, or one which affects the whole inheritance.²⁵⁹

The purchaser of the right, title and interest of a member of a Mitakshara joint family estate is entitled to ascertain the same by partition.²⁶⁰ At a sale in execution of a mortgage-decree, the interest of both the mortgagor and the mortgagee passes to the purchaser.²⁶¹ But where an undivided share in immoveable property, part of which is subject to mortgage, is sold in execution of a money-decree, the presumption is, in the absence of specific indication to the contrary, that the share sold was, as far as might be, the share which was not encumbered.²⁶²

Right, title and interest. The words, "right, title and interest," must be interpreted in the sense in which they are understood at the date of sale; any change in the interpretation of law will not affect the rights of the purchaser. Thus, by the law as then interpreted when the right, title and interest in an imparible zemindari was sold, the purchaser was only entitled to a life interest in the zemindari. Subsequently, this interpretation of the law was reversed by the Judicial Committee which held that the holder of an imparible zemindari is entitled to an absolute interest and that such interest is alienable. This new interpretation does not enlarge the rights of the purchaser under a sale made previous to the decision of the Judicial Committee.²⁶³ An execution sale, while it relates back to the attachment, is not confined to the debtor's title at that time. It includes in addition title held by the debtor at the moment of the sale, though acquired subsequent to attachment. But title acquired subsequent to the sale, does not

258. Gossain Das v. Mruttunjoy 18 C. L. J. 541.

259. Trilochan v. Bakkeswar 15 C. L. J. 423; Radha Kissen v. Nauratan 6 C. L. J. 490; Jotindro Mohan v. Jogml Kishore 7 Cal. 357; 9 C. L. R. 57.

260. Deodyal v. Jugdeep 4 L. A. 247; 3 Cal. 198; 1 C. L. R. 49; Suraj Bansi v. Sheo Pershad 6 I. A. 88; 5 Cal. 148; 4 C. L. R. 226; Madho

Parshad v. Mehrban 17 I. A. 194; 18 Cal. 157; Peary Lal v. Chandi Charan 11 C. W. N. 163; 5 C. L. J. 80.

261. Maganlal v. Shakra 22 Bom. 945.

262. Sheo Narain v. Nur Muhammad 29 All. 463.

263. Abdul Aziz v. Appayasami 31 I. A. 1; 27 Mad. 131; 8 C. W. N. 186; Viruthuroyar v. Ramanuja 37 Mad. 22.

inure to the benefit of the purchaser.²⁶¹ A minor is not bound by a sale in execution, if neither his rights and interests in the property nor, those of the persons through whom he claims, are expressed to be sold.²⁶⁵ When sued by a third party for possession, the purchaser can add the time the judgment-debtor was in possession to the time of his own possession, in calculating the time possession had been adverse to the plaintiff.²⁶⁶

The fact that before the reversal of the sale the decree-holder obtains another decree of a similar character against the judgment-debtor, does not validate the title based upon the decree which has been reversed.²⁶⁷ But, if the decree is subsequently restored, the sale shall also be restored.²⁶⁸ When a non-transferable holding is sold, the landlord is not entitled to re-enter, unless the tenant has abandoned the holding.²⁶⁹

The purchase is subject to all equities, lien, easements and conditions of which the purchaser had notice and to all defects revealed by the judgment and execution.²⁷⁰ Thus, a purchaser at an execution-sale is affected by the doctrine of *lis pendens* which, although it ends with the decree, revives on the execution proceedings being taken.²⁷¹ But where execution proceedings were taken four years after the decree, they did not revive the *lis pendens*.²⁷² The purchaser purchases the interests of the judgment-debtor at the time of sale, subject to all equities then existing, i.e., what was attached and sold and what he, without having special means of knowledge, inferred from the proceeding of sale that he was buying and not what

264. Freeman on Executions § 335; Umesh Chunder v. Zahur Fatima 17 I. A. 201; 18 Cal. 164.

265. Abdool Kureem v. Jaun Ali 18 W. R. C. R. 56; Dyal Singh v. Ram Buddun 17 W. R. C. R. 154.

266. Visvanath v. Subraya 15 Bom. 290; Ali Saheb v. Kaji Ahmed 16 Bom. 197.

267. Hazari Muli v. Janaki Prosad 6 C. L. J. 92.

268. Ramyad Sahu v. Bindeswari 6 C. L. J. 102.

269. Jogendra Nath v. Tineowri 10 C. L. J. 147.

270. Freeman on Executions § 335.

271. Faiyaz Husain v. Prag Narain 34 I. A. 102; 29 All. 339; 11 C. W. N.

561; 5 C. L. J. 563; Gobind Chunder v. Guruehurn 15 Cal. 94; Dinonath v. Shama Bibi 28 Cal. 23; 4 C. W. N. 740; Mati Lall v. Preo Lall 13 C. W. N. 226; 9 C. L. J. 96; Kumhi Umah v. Amed 14 Mad. 491; Moti Lal v. Karabaldin 24 I. A. 170; 25 Cal. 179; 1 C. W. N. 639; Shivjiram v. Waman 22 Bom. 939; Mahadeo Saran v. Thakur

Prosad 14 C. W. N. 677; 11 C. L. J. 528; Tinoodhan v. Trailokhya 17 C. W. N. 413; Byramji v. Chunikil 27 Bom. 266; Samal v. Babaji 28 Bom. 361; Garudhuj v. Baiju Mal 28 All. 337; Ramdoyal v. Ramtanoo 15 C. L. J. 137.

272. Bhoje Mahadev v. Gangabai 37 Bom. 621.

LECTURE VI. might have been sold.²⁷³ But his title is not subject to secret equities of which he had no notice, actual or constructive, though they are such as might be enforced against the judgment-debtor but for the sale.²⁷⁴

The decree-holder does not guarantee the title of the judgment-debtor, but being bound to notify before the sale all incumbrances on the property to be sold, he is estopped from setting up against the purchaser a secret encumbrance in his own favour. But to establish the plea of estoppel against the decree-holder, a statement in the sale certificate is not conclusive ; it is necessary to prove a statement made anterior to the purchase which may have influenced the conduct of the purchaser.²⁷⁵ A purchaser is bound by the estoppel which binds the judgment-debtor.²⁷⁶ He is bound by the principle of *res judicata* which bars the judgment-debtor.²⁷⁷ Right of easement passes against the judgment-debtor, as in a voluntary sale.²⁷⁸ But the mere notice of an alleged mortgage in the proclamation of sale does not preclude the purchaser from proving the real nature of the transaction.²⁷⁹ A purchaser in execution of his own decree is entitled to question the validity and *bona fide* of a mortgage on the property.²⁸⁰ If the mortgage turns out to be invalid, the judgment-debtor is not entitled to claim from the purchaser the amount due on the mortgage, as unpaid vendor's purchase-money.²⁸¹

The purchaser is liable for government revenue which fell due between the date of sale and the confirmation of sale.²⁸² By S. 65

273. Alukmonee v. Banee 4 Cal. 677 ; 3 C. L. R. 473 ; Dorab Ally v. Abdool Aziz 5 I. A. 116 ; 3 Cal. 806 ; 2 C. L. R. 529 ; Tara Lal v. Sarobar Singh 27 I. A. 33 ; 27 Cal. 407 ; 4 C. W. N. 533.

274. Freeman on Void Judicial Sales §41a.

275. Aman Ali v. Mir Hossain 10 C. L. J. 605 ; Prasanna Kumar v. Sreekantha 40 Cal. 173 ; 17 C. W. N. 137 ; 16 C. L. J. 202.

276. Prayag Raj v. Sidhu Prasad 35 Cal. 877 ; Mahomed Mozuffer v. Kishori Mohun 22 I. A. 129 ; 22 Cal. 909 ; Poreshnath v. Anathmath 9 I. A. 147 ; 9 Cal. 265 ; Debendranath v. Abdul Samed 10 C. L. J. 150 ; *contra* Ganesh v. Purshottam 33 Bom. 311.

277. Rampal Singh v. Ram Ghulam 32 I. A. 17.

278. Mookta Soonduree v. Muthoornath 22 W. R. 209 ; Huree Madhub v. Hem Chunder 22 W. R. 522.

279. Jairaj Mal v. Radha Kishan 35 All. 257 ; Shub Kunwar v. Sheo Prasad 28 All. 418 ; Ganesh v. Purshottam 33 Bom. 311.

280. Shahziauddin Abdul v. Kailash Chandra 2 C. L. J. 599.

281. Izzat-un-nissa Begum v. Partap Singh 36 I. A. 203 ; 31 All. 583 ; 13 C. W. N. 1143.

282. S. 30 B. L. R. Sales Act XI of 1859 ; Bhawani Kuwar v. Mathura Prasad 39 I. A. 228 ; 10 Cal. 89 ; 16 C. W. N. 385 ; 16 C. L. J. 606 ; Shyam

B. T. Act VIII of 1885, rent is a first charge on a tenure or holding; the purchaser must, therefore, be taken to purchase it, charged with the rent due in respect of it at the date of sale.²⁸³ But he is not personally liable for the rent which fell due before his purchase.²⁸⁴ A sale of a mortgaged property for Court-fee payable to the Government under O. 33, r. 10 C. P. C. Act V of 1908 by the mortgagee has no priority over a sale in execution of a mortgage-decree.²⁸⁵

A sale of an undesigned or unlocated part, as of a certain quantity of land out of a larger parcel, is void for uncertainty and the purchaser is not allowed to locate his purchase.²⁸⁶

The sale-proceeds shall be rateably distributed among those persons who have, before the sale, made application to the Court for the execution of decrees for payment of money, passed against the same judgment debtor and have not obtained satisfaction thereof.²⁸⁷ The object is to prevent unnecessary multiplicity of execution-proceedings in a case where there are many decree-holders and to obviate the necessity of each and every one separately attaching and separately selling a particular property and to secure an equitable administration of the property, by placing all the decree-holders upon the same footing and making the property rateably divisible among them, instead of allowing one to exclude all the others, merely because he happened to be the first who had attached and sold the property.²⁸⁸

Distribution
of sale-pro-
ceeds.

The decree-holders must have actually applied for execution of their decrees to the Court by which the assets are held,²⁸⁹ though it is not necessary to have the decrees transferred to the Court holding the assets.²⁹⁰

Kumari v. Rameswar Singh 31 I. A. 176 ;
32 Cal. 27 ; 8 C. W. N. 786 ; Bhyrub
Chunder v. Soudamini 2 Cal. 141 ;
Chatraput v. Grindra 6 Cal. 389 ; 7 C.
L. R. 456.

283. Bejoy Chand v. Sashi Bhusan
18 C. W. N. 136 ; Moharanee v.
Harendra Lall 1 C. W. N. 458 ; Manindra
Chunder v. Jamahir 32 Cal. 643 ;
9 C. W. N. 670 ; Satyendra Nath v.
Nilkantha 21 Cal. 389 ; Karuna Moyee v.
Surendra Nath 26 Cal. 176.

284. Jogemaya v. Girindra Nath
4 C. W. N. 599 ; Rash Behary v. Peary
Mohun 4 Cal. 346 ; 3 C. L. R. 116.

285. Ragho Prosad v. Mewa Lal 16

C. W. N. 433 ; 15 C. L. J. 327 ; Braja
Nath v. Joggeswar 9 C. L. J. 346.
286. Freemau on Void Judicial Sales
§37.

287. S. 73 C. P. C. Act V of 1908.
288. Per Strachey C.J., in Bithal Das
v. Nand Kishore 23 All. 106 ; see also
Chuni Lal v. Jugal Kishore 27 All.
132 ; Fiuk v. Maharaj Bahadoor 26 Cal.
772 ; 4 C. W. N. 27 ; Hasoon Arra v.
Jawadoonissa 4 Cal. 29.

289. Krishnashankar v. Chandra-
shankar 5 Bom. 198 ; Dattaraya v.
Rahimtulla 18 Bom. 456.

290. Clark v. Alexandar 21 Cal.
200 ; Har Bhagat v. Anandaram 2

LECTURE VI.

The application for execution must be made before the realisation of the assets by the Court.²⁹¹ The sale-proceeds are not deemed to be realised, until the entire amount of the purchase-money in respect of all the parcels is paid into Court and not when the property is sold, nor, when the sale is confirmed.²⁹² The assets must be realized by some process of Court in execution.²⁹³ Money paid by the judgment-debtor out of Court to the decree-holder, or to satisfy the attaching creditor's decrees and to raise the attachment, or deposited under S. 174 B. T. Act VIII of 1885, or O. 21, r. 89 C.P.C. Act of 1908 cannot be taken as assets.²⁹⁴

It is only holders of decrees for the payment of money that are entitled to rateable distribution. But every decree by virtue of which money is payable is to that extent a decree for money, even though other relief may be granted by the decree, e.g., sale of mortgaged property.²⁹⁵ Thus, a decree for payment of mesne profit, though the amount has not yet been ascertained,²⁹⁶ a decree for payment of mortgage-debt "from the mortgaged property and from the defendant personally,"²⁹⁷ a decree directing payment under O. 34, r. 6 C.P.C. Act V of 1908 of the balance of a mortgage-debt remaining due after payment of the nett proceeds of the sale of the mortgaged property,²⁹⁸ is a decree for the payment of money. A decree directing the payment of money by any person, does not

C. W. N. 126; *contra* Nimbaji v. Vadia 16 Bom. 683.

291. Fink v. Maharaj Bahadur 26 Cal. 772; 4 C. W. N. 27; Indra Chand v. Ghanshyam 9 C. L. J. 210; Srinivasa v. Seetharamayyar 19 Mad. 72.

292. Hafez v. Damodar 18 Cal. 242; Vishvanath v. Virchand 6 Bom. 16; Ramanthan v. Subramania 26 Mad. 179; Arihauthu Chetty v. Vyapuripandaram 35 Mad. 588; Indra Chand v. Ghanshyam 9 C. L. J. 210.

293. Vibhudapriva v. Yusuf 28 Mad. 380; Sew Bux v. Shih Chunder 13 Cal. 225; Prosommoyi v. Sreenath 21 Cal. 899; Purshotamdas v. Suraj Bharhi 6 Bom. 588; Gopal Dai v. Chunni Lall 8 All. 67; Gouri Dutt v. Amar Chand 15 C. L. J. 49; Jetha Bhima & Co. v. Janbad 37 Bom. 138.

294. Gouri Dutt v. Amar Chand 15

C. L. J. 49; Hari Sundari v. Shashi Bala 1 C. W. N. 195; Bihari Lal v. Gopal Lal 1 C. W. N. 695; Roshun Lal v. Ram Lal 30 Cal. 262; 7 C. W. N. 341; Sorabji Cooverji v. Kala Raghunath 36 Bom. 156; Harai Saha v. Faizlur Rahman 40 Cal. 619; 17 C. W. N. 636; 18 C.I.J. 144; Ganesh Bab v. Vithal Vaman 37 Bom. 387.

295. Hart v. Tara Prasanna 11 Cal. 718.

296. Viraraghava v. Varada 5 Mad. 123.

297. Hart v. Tara Prasanna 11 Cal. 718; Fazil v. Krishna 25 Cal. 580; 2 C. W. N. 118; Kartick v. Juggernath 27 Cal. 285; Ram Charan v. Sheobarat 16 All. 418; Pahalwan v. Narain 22 All. 401.

298. Mallikarjunudu v. Lingamurti 25 Mad. 244.

cease to be a decree for the payment of money, in so far as that person is concerned, merely because it directs, as against another person, the realization of a money-claim from mortgaged property.²⁹⁹ A judgment entered up under S. 81 of the Insolvent Debtor's Act 11 and 12 Vict. c. 21 is a money-decree.³⁰⁰

The judgment-debtor must be the same, and it is immaterial that he is one of the judgment-debtors and the decree-holder might have proceeded against the others.³⁰¹ Decrees may be against the judgment-debtors in some cases and against his legal representatives in others.³⁰² An attachment before judgment is effective, if a decree is subsequently obtained.³⁰³ But a decree-holder who causes property to be attached before judgment must, after judgment, make a fresh application for execution under O. 21, r. 11 C. P. C. Act V of 1908.³⁰⁴

The Court is competent to enquire summarily, whether any of the decree-holders claiming rateable distribution, is a benamdar for the judgment-debtor or not.³⁰⁵ But a claim to the attachment cannot be inquired into.³⁰⁶ When property attached by a superior Court is sold in execution proceeding in an inferior Court, the superior Court is the only Court competent to determine any claim for rateable distribution of assets realized by the sale.³⁰⁷ When a decree is transferred to another Court, the original Court can entertain an application for distribution of assets.³⁰⁸ The distribution of assets does not impart a conclusive adjudication of the rights of the parties which may, however, be done by regular suits.³⁰⁹

299. D & L. Bank v. Uncovenanted Service Bank 10 All. 35.

300. In re Bhagwandas 8 Bom. 511.

301. Shumbhoo Nath v. Luckynath 9 Cal. 920; Grant v. Subramaniam 22 Mad. 241; D & L. Bank v. Uncovenanted Service Bank 10 All. 35; Gonesh v. Shiva 30 Cal. 583; 7 C. W. N. 414; Gatti Lal v. Bir Bahadur 27 All. 158; Ramanthan v. Subramania 26 Mad. 179; Chotolal v. Nabibhai 29 Bom. 528; 7 Bom. L. R. 567.

302. Hart v. Tara Prasanna 11 Cal. 718; contra Govind v. Mohoniraj 25 Bom. 494.

303. Bhagawan Chandra v. Chandra Mala 1 C. L. J. 97.

304. Pallonji v. Jordon 12 Bom. 400.

305. Raghu Nath v. Chatrapat 1 C.W.N. 633; in re Sunder Das 11 Cal. 42; Chhangalal v. Fazarali 13 Bom. 154; Puran Chand v. Purnendra Narain 17 C. W. N. 326; 16 C. L. J. 582; Peary Lal v. Peary Das 18 C. L. J. 646.

306. Ramjas v. Guru Charan 14 C. W. N. 396; 11 C. L. J. 69.

307. Bhugwan Chandra v. Chundra Mala 29 Cal. 773; 1 C. L. J. 97; Badri Prasad v. Saran Lal 1 All. 359; Arihuthu Chetty v. Vyapuripandaram 35 Mad. 588.

308. Baij Nath v. F. H. Holloway 1 C. L. J. 315.

309. Shankar Sarup v. Mejo Mal 28 I. A. 203; 23 All. 313; 5 C. W. N. 649.

LECTURE VI. Where assets are paid to a person, not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.³¹⁰ Such suits being suits for money had and received, the period of limitation is 3 years from the date of receipt of the assets by the defendant.³¹¹ But a mere order to pay money is not sufficient to give a cause of action, until the money is actually paid.³¹² Application may also be made for refund of money levied in execution within 3 years when the right to apply accrues.³¹³

The rights of the Government are not affected.³¹⁴ A judgment-debt due to the Government is entitled to precedence.³¹⁵

Before the sale-proceeds have been actually distributed, any decree-holder may maintain a suit for a declaration that the decree of a rival decree-holder is collusive.³¹⁶ The insolvency of the judgment-debtor does not affect an order for rateable distribution of assets realised up to the date of the vesting order.³¹⁷

An appeal lies from an order for distribution, if it comes under S. 47 Act V of 1908 but not otherwise.³¹⁸ The High Court can interfere under S. 115 where the Court below puts an erroneous interpretation on S. 73.³¹⁹

310. S. 73 (2) C. P. C. Act V of 1908.

311. Art. 62 Sch. I Limitation Act IX of 1908; Vishnu v. Achut 15 Bom. 438; Shankar Sarup v. Mejo Mal 28 I. A. 203; 23 All. 313; 5 C. W. N. 649.

312. Hart v. Tara Prasanna 11 Cal. 718.

313. Art. 181 Sch. I Limitation Act IX of 1908; Kurupam v. Sadashiva 10 Mad. 66; Harish Chunder v. Chandra Mohan 28 Cal. 113; Mula Raj v. Debi Dihal 7 All. 371; Venkayya v. Raghava Charlu 20 Mad. 448; Girdhari v. Sital Prasad 11 All. 372.

314. S. 73 (3) C. P. C. Act V of 1908.

315. Sec. of State v. Bombay Landing Co. 5 Bom. H. C. 23.

316. Trailakya Nath v. Pulim Behari 3 C. L. J. 385.

317. Howatson v. Durrant 27 Cal. 351; 4 C. W. N. 610.

318. Jagadish v. Kripa Nath 36 Cal. 130..

319. Maharaja of Burdwan v. Apurba Krishna 14 C. L. J. 50; Indra Chand v. Ghaneshyam 9 C. L. J. 210; Sew Bux v. Shib Chunder 13 Cal. 225; Viraraghava v. Parasurama 15 Mad. 372.

LECTURE VII.

Compulsory Sales in execution of decrees for rent in Bengal.

“ Rent ” means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by him, and includes also money recoverable under any enactment for the time being in force, as if it was rent. But money payable in respect of forest rights is not rent.¹ Nor, impositions upon tenants under the denomination of abwab, mathat, or other like appellations in addition to the actual rent are rent ; nor, can they be recovered as such, for they are not lawfully payable.² S. 54 of Reg. VIII of 1793 laid down that all existing abwabs should be consolidated with the *Asal jama* into one specific sum and S. 55 prohibited the imposition of any new abwab or mathat upon the tenants on any pretence whatever, on a penalty of three times the amount imposed for the entire period of the imposition. S. 3 of Reg. V of 1812, though modified certain provisions of Reg. VIII of 1793, declared that nothing therein contained should be construed as sanctioning or legalising the imposition of arbitrary or indefinite cesses. S. 10 of Act X of 1850 and S. 11 of Act VIII (B. C.) of 1869 provided that if any sum was exacted from the tenants in excess of the sum specified in the patta, they were entitled to recover damages not exceeding double the amount so exacted. Even where it is proved that abwabs have been paid, or have been payable before the time of the Permanent Settlement, a landlord is not legally entitled to recover them from his tenants, even assuming that by the custom of the estate, or agreement, or judicial determination the tenants and their ancestors before them have, for a great number of years, paid such abwabs.³ When a particular sum is the lawful consideration for the use and occupation of the land it is rent and

1. Ss. 3 (5), 193 B. T. Act VIII of 1885 ; see Abdullah v. Asraf Ali 7 C. L. J. 152.

2. S. 74 B. T. Act VIII of 1885.

3. Chultan Mahton v. Tilukdari Sing 11 Cal. 175 (F. B.) ; Tilukhdari v. Chulhan Mahton 16 I. A. 152 ; 17 Cal. 131 ; Radha Prosad v. Bal Kowar 17 Cal.

726 ; Woomesh v. Barada 28 Cal. 17 ; Orjoon Sahoo v. Anund Singh 10. W. R. 257 ; Jotindra Mohan v. Chandra Nath 6 C. W. N. 360 ; Mathura Prosad v. Tota Singh 40 Cal. 806 ; 16 C. L. J. 296 ; Apurna Churn v. Kasam Ali 10 C. W. N. 527 ; 4 C. L. J. 527.

LECTURE VII. not abwab.⁴ Thus, *batta* being merely an allowance for the exchange of sicca rupees, i.e., Company's rupees introduced by Act XVII of 1835 is not an abwab. Hence, if a tenancy has been created before 1836, *batta* is *prima facie* not an abwab.⁵ But a stipulation for the payment of an abwab in a permanent mukarrari lease created since the B. T. Act VIII of 1885 is valid, as S.74 does not control S. 179 of the Act.⁶ Hence, abwabs are not recoverable from a permanent tenure-holder under a lease created before the Act which could not be recovered before the passing of the Act.⁷

Cesses.

Road cess and Public works cesses are not abwabs.⁸ But cesses, though recoverable by any process by which the amount may be recovered as rent, if it were due on account of rent of a transferable tenure, are not rent, as they are not payable for the use and occupation of land.⁹ They are only personal debts and cannot be properly recovered from the property on which they are assessed when such property belongs to a person who has not been recorded as proprietor under L. R. Act VII (B. C.) of 1876.¹⁰

Dak cess payable under the Zamindari Dak Act VIII (B. C.) of 1862 (now repealed by Act IV of 1907) is not rent. But where the Dak cess is claimed under the contract by which rent is payable, it must be regarded as rent, because it is claimed practically as part of the rent.¹¹

Moneys receivable as rent are money payable under (1) S. 38

4. Kalanand v. Eastern Mortgage Agency Co. 18 C. L. J. 83.

5. Rameshar Koer v. Gobardhan Lal 7 C. L. J. 202; Mir Tapurah v. Gopi Narayan 7 C.L.J. 251; Ram Saran v. Gyan Singh 6 C. L. J. 637; Ram Khelwan v. Kumar Roy 6 C. L. J. 667.

6. Krishna Chandra v. Sushila Soon-duri 26 Cal. 611; 3 C.W.N. 608; Assan-ulla v. Tirthabasini 22 Cal. 680; Gayratulla v. Girish Chandra 12 C. W. N. 175-

7. Gayratulla v. Girish Chandra 12 C. W. N. 175; Apurna Churn v. Kasam Ali 10 C. W. N. 527; 4 C. L. J. 527.

8. Narendra Kumar v. Gora Chand 33 Cal. 683; 3 C. L. J. 391; Ashutosh

v. Amir Mollah 3 C. L. J. 337; Surno-moyee v. Purresh Narain 4 Cal. 576.

9. Kishori Mohun v. Sarodamani 1 C. W. N. 30; Nobin Chand v. Bansennath 21 Cal. 722; Mohesh v. Umatara 16 Cal. 638; Assanulla v. Tirthabasini 22 Cal. 680.

10. S. 64 Road Cess Act IX (B. C.) of 1880; Shekaat Hosain v. Sasi Kar 19 Cal. 783; Ahsanulla v. Manjura Banoo 30 Cal. 778; Mahanund v. Bani Madhab 24 Cal. 27; Umachurn v. Aja-dannisa 12 Cal. 430.

11. Watson v. Sreekrishna 21 Cal. 132; Bijai Chand v. Brohmodas 1 C. L. J. 101n; Jillar Rahman v. Bijoy Chand 28 Cal. 293; Jnanada Sundari v. Atul Chandra 32 Cal. 972.

of the Bengal Survey Act V (B. C.) of 1875 ; (2) S. 83 of the Irrigation Act III (B. C.) of 1876 ; (3) Ss. 47, 64 A of the Cess Act IX (B. C.) of 1880 ; (4) S. 44 of Bengal Drainage Act VI (B. C.) of 1880 ; (5) S. 10 of the Court of Wards Estates Act III (B. C.) of 1881 ; (6) S. 74 of the Bengal Embankment Act II (B. C.) of 1882 ; (7) Ss. 23 and 24 of the Bengal Sanitary Drainage Act VIII (B. C.) of 1895.

Interest decreed on arrears of rent and damages awarded in lieu of interest are arrears of rent.¹² A sum of money payable by a tenant out of the rent to a third person under assignment is rent, although not payable to the landlord, for the assignee not being a party to the assignment and not having accepted it, in the contemplation of the parties, the money does not cease to be a part of the rent, or recoverable as such.¹³ So, where an assignment of arrears of rent after they fell due is made, the amount due is rent, for the money was due as rent at the time of the assignment and the assignment does not deprive it of that character, so far at all events as the tenant is concerned.¹⁴ But where Government revenue agreed to be paid by a Putnidar on behalf of the Zemindar is a part of the consideration for the enjoyment of the tenure, but is not to be dealt with as rent, it is not rent.¹⁵

Where a tenant is a permanent tenure-holder, a raiyat holding at a fixed rate, or an occupancy raiyat, the rent is a first charge on the tenure or holding.¹⁶ So also, subject to this, is the amount of damages decreed to the landlord, when in a suit between the landlord and tenant, the tenant renounces his character as tenant of the landlord by setting up, without reasonable and probable cause, title in a third person or himself.¹⁷ A decree for arrears of rent due in respect of a tenure or holding, or a decree for damages under S. 186 A may be executed to enforce these charges by the sale of the tenure or holding, provided the decree has been obtained by (a) a sole landlord, or

Rent and
damages are
first charge
on the tenure
and holding.

12. S. 161 (c) B. T. Act VIII of 1885.

13. Basanta Kumari v. Ashutosh 27 Cal. 67 ; 4 C. W. N. 3 ; Bhekdhari v. Badhsingh 27 Cal. 663 ; Jnanada Sundari v. Atul Chandra 32 Cal. 972.

14. Munsar v. Loknath 4 C. W. N. 10 ; Srish Chunder v. Nachim Kazi 27 Cal. 827 ; 4 C. W. N. 357 ; Mohendro Nath v. Koilash Chandra 4 C. W. N. 605.

15. Jotindra Mohan v. Jarao Kumari

33 I. A. 30 ; 33 Cal. 140 ; 10 C. W. N. 201 ; 3 C. L. J. 7 ; see also Hemendra Nath v. Kumar Nath 32 Cal. 169 ; 9 C. W. N. 96 ; Kali Kumar v. Bidhu Bhusan 16 C. L. J. 89.

16. S. 65 B. T. Act VIII of 1885 ; S. 104 Act X of 1859 ; S. 4 Act VIII (B. C.) of 1865 ; S. 59 Act VIII (B. C.) of 1869.

17. S. 186A B. T. Act VIII of 1885.

LECTURE VII.

(b) the entire body of landlords, or (c) one or more co-sharer landlords who has or have sued for the rent due to all the co-sharers in respect of the entire tenure or holding and made all the remaining co-sharers parties defendants to the suit.¹⁸

A decree obtained by a landlord who at the time is the sole registered proprietor, is a decree for rent, even if it appears ultimately that he is not the sole landlord.¹⁹ So, is a decree for arrears of rent obtained by the landlord against the defaulting tenant, as having accrued due between the date of sale of the tenure in execution of a rent-decree and the date of confirmation of the sale.²⁰ An agreement for payment of rent to co-sharer landlords separately does not bar the right of one co-sharer to sue for the whole rent making his co-sharers defendants and to bring the tenure to sale in execution of the decree.²¹ But if the decree be in favour of a co-sharer in a joint undivided estate for his share of the rent, it has no further effect than a mere decree for money.²² A fractional co-sharer, therefore, who has obtained a decree for his share of the rent cannot sell the tenure or holding, for if he were allowed to do so, it would be unfair to his other co-sharers who had not sued for their shares of the rent.²³ Where two co-sharer landlords obtain separate decrees for rent for the same period (each making in his own suit his co-sharer a party) and the tenure is sold in execution of the decree obtained by one of them, the other cannot execute the decree

18. Ss. 148A, 158B B. T. Act VIII of 1885.

19. Mafizuddin v. Asutosh 14 C.W.N. 352; 11 C. L. J. 140.

20. Karuna Moyee v. Surendra Nath 26 Cal. 176.

21. Pramada Nath v. Ramani Kanta 35 I. A. 73; 35 Cal. 331; 12 C. W. N. 249; 7 C. L. J. 139.

22. Dwarka Nath v. Suvidha 8 C.L.R. 407; Gobind Chunder v. Ram Chunder 22 W. R. 421; Dwarkanath v. Dhun Monee 15 W. R. 524; Meetoonjoy v. Khettr Nath 5 W. R. (Act X) 71.

23. K. B. Dutt v. Gostha Behari 16 C. W. N. 1006; 16 C. L. J. 379; Hari Charan v. Ranjit Singh 25 Cal. 917n; 1 C. W. N. 521; Narainuddin v. Sreemanta Ghosh 29 Cal. 219; 5 C. W. N. 327; Sadagar Sircar

v. Krishna Chandra 26 Cal. 937; 3 C. W. N. 742; Surbo Lal v. Wilson 32 Cal. 680; Jarip v. Ram Kumar 3 C.W.N. 747; Afraz Mollah v. Kulsumannessa 10 C. W. N. 176; 4 C. L. J. 68; Pramada Nath v. Ramani Kanta 35 I. A. 73; 35 Cal. 331 12 C. W. N. 249; 7 C. L. J. 139; Sashi Kumar v. Seeta Nath 35 Cal. 774; 7 C. L. J. 425; Jiban Krishna v. Brojo Lal 30 I. A. 81; 30 Cal. 550; 7 C. W. N. 425; Prem Chand v. Mokshoda 14 Cal. 201; Bijoy Sankar v. Rajendra Kumar 13 C. W. N. 746; 9 C. L. J. 479; Durga Charan v. Kali Prasanna 26 Cal. 727; 3 C. W. N. 586; Sita Nath v. Atmaram 4 C. W. N. 571; Doorgadlur v. Huro Mohini 13 C. W. N. 270; Beni Madhub v. Jaod Ali 17 Cal. 390.

by the sale of the same tenure but is only entitled to recover the sum from the sale-proceeds as a first charge.²⁴

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Rent is not regarded as due from the person against whom the decree is obtained but is due in respect of the tenure.²⁵ The landlord is therefore in the position of a first mortgagee, as far as the rent is concerned.²⁶ He does not waive the right secured to him to preserve the integrity of the tenure by suing the registered transferee of a part of the tenure jointly with the transferor,²⁷ or by recognising the subdivision of the tenure by the tenants and choosing to accept a decree making each of them separately liable for his own share of the rent.²⁸

When a tenure is sold in execution of a mortgage decree, it passes to the purchaser, subject to the charge for rent, and can be sold in execution of a decree for rent accruing due previously to the confirmation of sale.²⁹ But where it is sold in execution of a rent decree, it cannot be resold for any arrears accrued before the date of sale.³⁰ The fact that the tenant has become an insolvent and his tenure has vested in the Official Assignee does not prevent the decree-holder from selling the tenure in execution of his decree.³¹

Under the former rent law, Act X of 1859, a decree for arrears of rent of a saleable under tenure could not be executed by the attachment and sale of any immoveable property except the tenure itself, unless it was shown that the satisfaction of the decree could not be obtained by execution against the person or moveable property of the tenant, judgment-debtor.³² So, if the decree were not for arrears of rent of a saleable tenure, but for money due under the

Sale of tenure
and holding.

24. Nilambar v. Satyapriya 16 C. W. N. 701.

Lal 1 C. W. N. 458.

25. Shamchand v. Brojonath 21 W. R. 94; 12 B. L. R. 484; Kanta Laik v. Lachman Ojha 16 C. L. J. 197.

30. Faez Rahman v. Ramsukh

26. S. 65 B. T. Act VIII of 1885; Tarini Prosad v. Narayan Kunari 17 Cal. 301; Moharanee Dasya v. Harendra Lal 1 C. W. N. 458; Royzuddi v. Kali Nath 33 Cal. 985; 4 C. L. J. 219; Meherunesa v. Sham Sundar 6 C. W. N. 834.

21 Cal. 169; Ram Chunder v. Samir Gazi 20 Cal. 25; Luteefan v. Meah Jan 6 W. R. 112; Prangour v. Hemanta Kumari 12 Cal. 597; Ram Saran v. Mahomed Latif 3 C. W. N. 62.

27. Sourendra Mohan v. Surnomoyi 26 Cal. 103; 3 C. W. N. 38.

31. Chunder Narain v. Kishen Chand 9 Cal. 855.

28. Surbo Lal v. Wilson 32 Cal. 680.

32. S. 105 Act X of 185; Deenutoollah v. Nazir Ali 1 B. L. R. A. C. 216; 10 W. R. 341; Jokee Lal v. Narsing Narain 1 W. R. (Act X) 5; Hurish Chunder v. Coll. of Jessore 3 Cal. 712; Lalit Mohan v. Binodai 14 Cal. 14.

29. Moharanee Dasya v. Harendra

LECTURE VII. Act, the decree-holder was bound to proceed in the first instance against the person and moveables of the judgment-debtor and after they had been exhausted, execution could be taken out against immoveable property for the balance.³³ But under the present law the landlord has a charge upon the tenure or holding for the rent and damages for denial of landlord's title and also a remedy against the tenant personally for the debt due to him, so that he is not bound to proceed against the tenure or holding in respect of which the arrears or damages have accrued in the first instance, but is entitled to pursue his other remedy before he sells the tenure or holding itself.³⁴

Mode of enforcing charge.

Where a decree for rent has not been, or cannot be, enforced by the sale of the tenure, the charge created by S. 65 B. T. Act VIII of 1885 cannot be enforced in any other way.³⁵ Thus, when a landlord has taken a mortgage of the holding of a tenant, he is debarred under O. 34, r. 14 C. P. C. Act V of 1908 from bringing it to sale in execution of a decree for arrears of rent due in respect of it, otherwise than by instituting a suit under S. 67 T. P. Act IV of 1882.³⁶ So, also a landlord who purchases the defaulting tenure in execution of his money-decree, subject to rent charge, cannot execute his rent-decree, as the judgment-debt in his favour for rent is extinguished.³⁷ A single decree for the consolidated rent of several tenures,³⁸ or a decree obtained in a suit on an instalment bond

33. S. 109 Act X of 1859; Bhikari Sukul v. Godadhar Ramanuj 17 C. W. N. 87; 16 C. L. J. 586; Chaitan Patgosi v. Kunja Behary 38 Cal. 832; 15 C. W. N. 863; 14 C. L. J. 284.

34. Ss. 65, 186A B. T. Act VIII of 1885; Sailaja Prosad v. Gyani Das 18 C. L. J. 29; Sourendra Mohan v. Surnomoyi 26 Cal. 103; 3 C. W. N. 38; Tarini Prosad v. Narayan Kumari 17 Cal. 301; Bhabani Charan v. Pratap Chandra 8 C. W. N. 575; Fotick Chunder v. Foley 15 Cal. 492.

35. Soshi Bhusun v. Gagan Chunder 22 Cal. 364.

36. Ramani v. Surendranath 1 C. W. N. 80; Sheodeni v. Ram Saran 26 Cal. 164; 3 C. W. N. 290; Tokhan Singh v. Girwar Singh 32 Cal. 491; 9 C. W. N. 372; 1 C. L. J. 118; Chundra

Nath v. Burroda Shoondury 22 Cal. 813; Aubhoyessuri v. Gouri Sunkur 22 Cal. 859; Basiruddin v. Kailas 33 Cal. 113; Ashutosh v. Behari Lal 35 Cal. 61; 11 C. W. N. 1011; 6 C. L. J. 320.

37. Sailaja Prosad v. Gyani Das 18 C. L. J. 29; Meheruunesa v. Sham Sundar 6 C. W. N. 834.

38. Muluk Chand v. Satish Chandra 14 C. W. N. 335; 11 C. L. J. 56; Rash Mohini v. Debendra Nath 16 C. W. N. 395; Hridaynath v. Krishna Prasad 34 Cal. 298; 11 C. W. N. 497; 6 C. L. J. 153; Kanta Laik v. Lachman Ojha 16 C. L. J. 197; Bipra Dass v. Raja Ram 36 Cal. 765; 13 C. W. N. 650; Baikanta Nath v. Debendra Nath 11 C. W. N. 676; Nanda Lal v. Sadhu Charan 7 C. L. J. 96.

for arrears of rent,³⁹ or a decree for rent obtained against a Hindu widow,⁴⁰ operates merely as a decree for money.

LECTURE VII.

But neither the nature of the debt, nor the decree for arrears of rent makes the tenure *ipso facto* hypothecated for the debt. The right to bring a tenure or holding to sale belongs exclusively to the landlord and exists so long as the relationship of landlord and tenant exists. Hence, a person to whom certain rents are due and who obtains a decree therefor after he has parted with the property in which the tenancy is situate has no such right.⁴¹ So, if at a time when a suit for rent is instituted and a decree obtained the plaintiff is still the landlord, the fact that subsequently he sells his landlord's interest does not prevent him from bringing to sale the tenure or holding in execution of such a decree.⁴² But a decree obtained in a suit for rent brought by a landlord who ceases to have interest in the land before or during the pendency of the suit or by a mere assignee only of the arrears of rent from the landlord, can be executed as a money-decree only.⁴³ So also, an assignee of a decree for arrears of rent in whom the landlord's interest in the property itself is not vested can execute the decree only as an ordinary money-decree.⁴⁴

An application for the execution of a decree for arrears of rent obtained by a landlord shall not be made by an "assignee of the decree," unless the landlord's interest in the land at the date of the application has become and is vested in him.⁴⁵ This rule imposes a limitation upon the execution of a decree for rent and it should

Execution by
an assignee of
a rent-decree.

39. Royzuddi v. Kali Nath 33 Cal. 985; 4 C. L. J. 219; Hridoy Nath v. Joyram 4 C. L. J. 402.

40. Krishua Gopal v. Hem Chunder 16 Cal. 511.

41. A. H. Forbes v. Maharaj Bahadur 18 C. W. N. 747 P. C., reversing Maharaj Bahadur v. A. H. Forbes 35 Cal. 737; 7 C. L. J. 652.

42. Khetra Pal v. Kritarthamoyi 33 Cal. 566; 10 C. W. N. 547; 3 C. L. J. 470, overruling Hem Chunder v. Mon Mohini 3 C. W. N. 604.

43. A. H. Forbes v. Maharaj Bahadur 18 C. W. N. 747, reversing Maharaj Bahadur v. A. H. Forbes 35 Cal. 737; 7 C. L. J. 652; Nagendra Nath v. Bhupan Mohan 6 C. W. N. 91; Srimanta v. Ma-

hadeo 31 Cal. 550; 8 C. W. N. 531; Doorgadbur v. Huro Mohini 13 C. W. N. 270; Bijoy Sankar v. Rajendra Kumar 13 C. W. N. 746 at p. 749; 9 C. L. J. 479; Mohendro Nath v. Koilash Chandra 4 C. W. N. 605.

44. Dino Nath v. Golap Mohini 1 C. W. N. 183; Manurathan v. Hari Nath 1 C. L. J. 500; Guru Charan v. Kartik Nath 10 C. W. N. 44.

45. S. 148 (h) B. T. Act VII of 1885; see Shambhu Nath v. Sheo Pershad 40 Cal. 162; 17 C. W. N. 276; 17 C. L. J. 227, overruling Dwarka Nath v. Peari Mohan 1 C. W. N. 694; Manmootho Nath v. Rakhal Chandra 14 C. W. N. 752; 10 C. L. J. 396; Karuna Moyee v. Surendra Nath 26 Cal. 176.

LECTURE VII. therefore be interpreted strictly and should not be extended to any person who does not come properly within its provision.⁴⁶ Thus, the word "assignee" does not include the heir or representative of the decree-holder,⁴⁷ nor a trustee for the benefit of the decree-holder's heirs.⁴⁸

Limitation.

An application for execution of a decree for rent for a sum not exceeding Rs. 500, exclusive of any interest which may have accrued after decree upon the sum accrued but inclusive of costs of executing such decree, must be made within three years from the date of the final decree in the suit, or appeal, or review, as the case may be, unless the judgment-debtor has by fraud, or force prevented the execution.⁴⁹ The period of limitation will be the same even when a co-sharer landlord obtains a decree for rent due to himself or to all the others.⁵⁰ Limitation runs from the date of the decree and not from the date fixed for payment.⁵¹ When there is a special rule of limitation prescribed by law it cannot be extended by the application of the ordinary rules prescribed by the general law of limitation.⁵²

Application
for execution.

When the decree-holder applies for the attachment and sale of the tenure or holding in execution of the decree, he shall produce a statement showing the pargana, estate and village in which the land comprised in the tenure, or holding is situate, the yearly rent payable for the same and the total amount recoverable under the decree.⁵³ He shall also specify in such application, the registered and notified incumbrances subject to which the tenure, or holding is to be sold. The specification shall be verified in the manner prescribed by the Code of Civil Procedure for the verification of plaints by the decree-holder, or by some other person approved by the Court.⁵⁴ If the

46. Nagendra Nath v. Bhuban Mohan 6 C. W. N. 91; Manurathan v. Hari Nath 1 C. L. J. 500.

47. Umasoondury v. Brojonath 16 Cal. 317.

48. Chhatrapat Singh v. Gopichand 26 Cal. 750; 4 C. W. N. 416.

49. Art. 6 Sch. III B. T. Act VIII of 1885; S. 92 Act X of 1859; see Shyam Chandra v. Inkailu Ram 6 C. L. J. 146; Golokimoney v. Mohesh Chunder 3 Cal. 547; 1 C. L. R. 149.

50. Mrityunjoy v. Bhola Nath 18 C. L. J.

81; Thakamani v. Mohendra Nath 10 C. L. J. 463. See however, K. B. Dutt v. Gostha Behary 16 C. W. N. 1006; 16 C. L. J. 379.

51. Ram Saday v. Dwarka Nath 22 Cal. 644; Maamtazul Huq v. Nirbhai Singh 9 Cal. 711; 12 C. L. R. 318.

52. Kali Charan v. Harendra Lal 4 C. L. J. 553; Mackenzie v. Syed Mahomed 19 Cal. 1 (F. B.)

53. S. 162 B. T. Act VIII of 1885.

54. High Court's General Rules and Circular Orders Chap. I rule 26.

Conrt admit the application, it shall issue simultaneously the order of attachment and proclamation.

The proclamation shall, in addition to stating and specifying particulars mentioned in O. 21, r. 66 C. P. C. Act V of 1908, announce (*a*) in the case of tenure or holding of a raiyat holding at fixed rates, that it will first be put up to sale subject to registered and notified incumbrances, but if the sum be insufficient to liquidate the amount of the decreee and costs it will be sold on a subsequent day with power to annul all incumbrances ; and (*b*) in the case of an occupaney holding, it will be sold with power to annul all incumbrances. The proclamation shall besides being made in the manner prescribed by O. 21, r. 67 C. P. C. Act V of 1908, be published by fixing up a copy thereof in a conspicuous place of the land comprised in the tenure or holding,⁵⁵ and in the mal kaehari or rent-office of the estate and at the local thana.⁵⁶ Notwithstanding O. 21, r. 68 C. P. C. Act V of 1908, the sale shall not without the consent in writing of the judgment-debtor take place until after the expiration of at least thirty days from the date when the copy of the proclamation has been fixed upon the land comprised in the tenure or holding.⁵⁷

When the defaulting tenure or holding is attached, no claim under O. 21, r. 58 C. P. C. Act V of 1908 is maintainable, whether the claim is to the tenure or holding or adverse to it.⁵⁸

When an order for the sale of a tenure or holding has been made, it shall not be released from attachment, unless before it is knocked down to the auction-purchaser, the amount of the decreee with costs is paid into Conrt by the judgment-debtor, or any person having in the tenure or holding any interest voidable on the sale, or the decree-holder applies for its release on the ground that the decree has been satisfied out of Court.⁵⁹ The holder of an under-tenure liable to be avoided would be justified in making a payment to prevent the sale of the tenure.⁶⁰ But the purchaser of a tenure

Proclamation of sale.

Release from attachment.

55. S. 163 (3) B. T. Act VIII of 1885.

56. Calcutta Gazette, March 3, 1886, Part 1 p. 142.

57. S. 163 (4) B. T. Act VIII of 1885.

58. S. 170 (1) B. T. Act VIII of 1885.

See Makbul Ahmed v. Rakhal Das 1 C. W. N. 732 ; Amrita Lal v. Nemai Chand 28 Cal. 382 ; 5 C. W. N. 474 ; Khetra Pal v. Kritarthamoyi 32 Cal.

566 ; 10 C. W. N. 547 ; 3 C. L. J. 470 ;

Deb Narain v. Narendra Krishna 16 Cal.

267 ; Chundra Sekhar v. Manjhee

3 C. W. N. 386 ; Sarajendra Krishna v.

Sanyasi Charan 12 C. L. J. 551.

59. S. 170 (2) and (3) B. T. Act VIII

of 1885.

60. Brindurani v. Annoda Mohan 16

C. W. N. 94 ; Jnanada Sundari v.

LECTURE VII. from a tenant against whom the decree for rent was obtained has no right to make a deposit, as he has not an interest in the tenure voidable by the sale.⁶¹ A transferee of a tenure or a portion of it whose name is not registered in the landlord's sherista may make payment,⁶² but a transferee of a nontransferable occupancy holding cannot.⁶³ Where the Court orders the applicant to make a deposit without an enquiry as to his right to make the deposit the order is not appealable, but is open to revision by the High Court under S. 115 C. P. C. Act V of 1908.⁶⁴ Notice should be given to the decree-holder and also to the judgment-debtor.⁶⁵

Rights of
persons mak-
ing payment.

The amount paid by such person to prevent the sale shall be deemed to be a debt bearing interest at 12 p. c. per annum and secured by a mortgage of the tenure or holding to him which shall take priority over every charge, other than a charge for arrear of rent ; he shall be entitled to possession of the tenure or holding as a mortgagee of the tenant, and to retain possession of it as such, until the debt with interest has been discharged.⁶⁶ A person who has made payment is entitled to be placed in possession in execution of the decree and is not bound to bring a regular suit for the purpose, unless the person in possession is a third party.⁶⁷ An underlessee in such possession cannot be evicted by the landlord when the lessee has surrendered during such possession without the payment of the amount due by virtue of the statutory lien.⁶⁸ But the statutory lien so created does not affect any other remedy to which the person making the deposit is entitled.⁶⁹ Thus, he can bring a regular suit

Atul Chandra 32 Cal. 972 ; Jugul Mohini

C. W. N. 652.

v. Srinath 12 C. L. J. 609 ; Umatul Fatima v. Nemai Charan 6 C. L. J. 592.

64. Gobinda Sunder v. Chand Meah 17 C. W. N. 602.

61. Jotindra Mohan v. Durga Dabe 10 C. W. N. 438.

65. Ram Nath v. Rudra Mahanti 18 C. L. J. 142.

62. Anund Loll v. Kalika Persad 20 W. R. 59 ; 12 B. L. R. 489u ; Rajendra Narain v. Phudy Mondul 15 Cal. 482 ; Radhika Nath v. Rakhal Raj 13 C. W. N. 1175 ; 10 C. L. J. 473 ; Tarak Das v. Harish Chandra 17 C. W. N. 168 ; 16 C. L. J. 548.

66. S. 171 B. T. Act VIII of 1885. 67. Umatul Fatima v. Nemai Charan 6 C. L. J. 592 ; Radhika Nath v. Rakhal Raj 13 C. W. N. 1175 ; 10 C. L. J. 473 ; Ram Narain v. Lal Das 12 C. W. N. 55 ; 6 C. L. J. 595.

63. Nalini Behary v. Fulmani 16 C. W. N. 421 ; 15 C. L. J. 388 ; Nissa Bibi v. Radha Kishore 11 C. W. N. 312 ; Prosunno Kamar v. Bauna Charan 13

68. Nabadip Chandra v. Bhairab Chandra 13 C. W. N. 97.

69. S. 171 (2) B. T. Act VIII of 1885.

for the recovery of the money deposited by enforcing the charge.⁷⁰ But the purchaser at a sale in execution of a mortgage-decree making the deposit cannot recover the money, as there is no privity between him and the judgment-debtor under the decree for arrear of rent.⁷¹

When an inferior tenant whose interest would be voidable upon the sale pays money into Court to prevent the sale, he may, in addition to any other remedy provided for him by law, deduct the whole or any portion of the amount so paid from any rent payable by him to his immediate landlord who, if he is not the defaulter, may, in like manner, deduct the amount so deducted from any rent payable by him to his immediate landlord and so on, until the defaulter is reached.⁷²

A mortgagee making payment to save the property from being sold has an additional lien on the property for the sum so paid.⁷³ But a cotenant making a similar payment is not entitled to a charge but only to a right to contribution personally from the other co-tenants.⁷⁴ When a landlord does not question the right of a party to make the deposit but withdraws the money, he is estopped from subsequently questioning his right.⁷⁵

The decree-holder may, without the permission of the Court, bid for or purchase the tenure or holding at a sale in execution of a decree for arrear of rent. But the judgment-debtor shall not bid for, or purchase, the tenure or holding so sold, and if he purchases by himself or through another person, the Court may, on the application of the decree-holder or any other person interested in the sale, set aside the sale and any deficiency of price on the resale and all costs shall be paid by the judgment-debtor.⁷⁶ But a recorded tenant who has no existing interest in the tenure and whose interest was sold previously in execution of a money-decree may purchase.⁷⁷ A

Purchaser.

70. Hemanta Kumar v. Rajendra Bala 13 C. L. J. 454; Ambika Debi v. Pranhari 4 B. L. R. (F.B.) 77; 13 W. R. (F.B.) 1; Luckhi Narain v. Khettro Pal 13 B. L. R. 146; 20 W. R. 380.

71. Moharanee Dasya v. Harendra Lal 1 C. W. N. 458.

72. S. 172 B. T. Act VIII of 1885.

73. Rakhohari v. Bipra Das 31 Cal. 975; Upendra Chandra v. Tara Prosanna

30 Cal. 794; 7 C. W. N. 609.

74. Gopi Nath v. Ishur Chundra 22 Cal. 800; Kinu Ram v. Mozaffer Hossain 14 Cal. 899.

75. Thomas Barclay v. Syed Hossein 6 C. L. J. 601; Jugal Mohini v. Srinath 12 C. L. J. 609.

76. S. 173 B. T. Act VIII of 1885.

77. Gopal Chunder v. Raia Lall 21 Cal. 554.

LECTURE VII.

judgment-debtor bidding for, or purchasing, property renders himself liable to punishment under S. 185 I. P. C.

Purchase by
judgment-
debtor is
not void.

The sale is not *ipso facto* void but only voidable at the instance of the decree-holder, or any other person interested in the sale and the proper Court to determine whether the sale should stand or fall is the Court that held the sale.⁷⁸ An attaching creditor has a *locus standi* to apply to set aside the sale.⁷⁹ So has an unregistered transferee of an occupancy holding.⁸⁰ The decree-holder and the judgment-debtor are unnecessary parties to the proceedings to set aside the sale.⁸¹

An application to set aside the sale should be made within three years from the date when the right to apply accrues.⁸² Whether an appeal lies from an order allowing or disallowing an application to set aside a sale, depends upon the question raised, as also on the parties between whom it arises.⁸³ Thus, no appeal lies from an order setting aside a sale by the auction-purchaser, even when fraud is alleged, although an appeal may lie on behalf of the decree-holder or co-judgment-debtor, when the sale is allowed to stand.⁸⁴ A person not a party to the suit may bring a separate suit to have the sale set aside.⁸⁵

Sale.

The tenure or holding at fixed rates shall at first be put up to sale, subject to registered and notified incumbrances, but if the bidding does not reach a sum sufficient to liquidate the amount of the decree and costs and if the decree-holder so desire, the sale shall be adjourned and a fresh proclamation shall issue, announcing that the tenure or holding will be sold with power to avoid all incumbrances upon a future day, not less than fifteen or more than thirty days from the date of the postponement.⁸⁶ Ordinarily, an occupancy holding shall be put up to sale with power to avoid all incumbrances

78. Gopal Chunder v. Ram Lall 21 Cal. 551.

79. Eastern Mortgage Co. v. Gobind Chandra 3 C. W. N. xiv.

80. Azgar Ali v. Asaboddin 9 C. W. N. 134.

81. Mohima Chandra v. Jogendro Kumar 3 C. W. N. xiv.

82. Art. 181 Sch. I Limitation Act IX of 1908; Chand Monjee v. Santo Monjee 21 Cal. 707; 1 C. W. N. 534.

83. Joytara v. Prankrishna 13 C. L. J.

257.

84. Roghu Singh v. Misri Singh 21 Cal. 825; Chand Monjee v. Santo Monjee 24 Cal. 707; 1 C. W. N. 534; Jadab Chandra v. Joy Gopal 19 C. L. J. 81; Harabandhu v. Harish Chandra 3 C. W. N. 184; Amir Rai v. Basdeo Singh 5 C. L. J. 204.

85. Gopal Chunder v. Ram Lall 21 Cal. 551.

86. Ss. 164, 165 B. T. Act VIII of 1885.

and when so sold the purchaser may annul any incumbrance in the holding.⁸⁷ But the Local Government may, from time to time by notification in the official Gazette, direct that occupancy holdings or any specified class of occupancy holdings be dealt with as tenures and first put up to sale, subject to registered and notified incumbrances.⁸⁸

If at any time within 30 days from the date of sale, the judgment-debtor deposits in Court for payment to the decree-holder (a) the amount recoverable under the decree with costs and (b) for payment to the purchaser a sum equal to five per cent of the purchase-money, the sale shall be set aside. But if he applies under O. 21, r. 90 C. P. C. Act V of 1908 to set aside the sale on the ground of irregularity or fraud in publishing or conducting the sale, he shall not be entitled to make this application, and if he makes this application he shall not be entitled to make the other application; in other words, he cannot simultaneously prosecute both the applications.⁸⁹ The judgment-debtor can get no extension of time on the ground of fraud, as S. 18 Limitation Act IX of 1903 has no application.⁹⁰ The whole amount recoverable under the decree, or as modified by the appellate Court, must be deposited in Court within the time; the Court cannot extend the time.⁹¹ S. 174 B. T. Act VIII of 1885 applies to sales held under Bengal Rent Recovery Act VIII (B. C.) of 1865, read with S. 105 Act X of 1859 in respect of property situate in Orissa Division.⁹²

It is only the "judgment-debtor" and the judgment-debtor alone and not his transferee or assignee after the transfer or assignment, who can make the deposit.⁹³ But an unrecorded co-sharer in a tenancy is not a representative in interest of the recorded tenant against whom a decree for rent was obtained by the landlord.⁹⁴ Before the amendment of the Bengal Tenancy Act VIII of 1885, by Act 1 (B. C.) of 1907, the provisions of S. 310A C. P. C. Act

LECTURE VII.

Sale set aside
on payment
by judgment-
debtor.

87. S. 166 B. T. Act VIII of 1885.

Jadunandan 16 C. W. N. 736.

88. S. 168 B. T. Act VIII of 1885.

92. Barkal Parida v. Jogendra Nath

89. S. 174 B. T. Act VIII of 1885;

16 C. W. N. 311; 14 C. L. J. 168.

cf. O 21, rr. 89, 90 C. P. C. Act V of
1908.

93. Nityanund v. Uday Narain 18

90. Radhashyam v. Dinabandhu JS
C. W. N. 31; 18 C. L. J. 533.

C.W.N. 175; Ramajit Kunwar v. Jogendra

91. Kabilas v. Raghu Nath 18 Cal.
481; Bhiki Singh v. Bhanu Mahlon 3
C. W. N. 231; Raghubar Doyal v.

Nath 16 C. L. J. 516; Abdul Sobban v.

Monab Ali 15 C. L. J. 170; Rajendro

Narain v. Phudy Mondul 15 Cal. 482.

94. Joytara v. Prankrishna 13 C. L.

J. 257.

LECTUREVII. XIV of 1882 (O. 21, r. 89 C. P. C. Act V of 1908) were made applicable to the sales held in execution of rent decrees, which allowed any person whose immoveable property had been sold in execution of a decree, to apply to have the sale set aside on his depositing, within thirty days of the sale, the decretal amount and 5 per cent of the purchase-money. Hence, if a person, not being the judgment-debtor, could not apply under S. 174 of B. T. Act VIII of 1885, he could always do so under S. 310A C. P. C. Act XIV of 1882 (O. 21, r. 89 C. P. C. Act V of 1908,) and obtain the same relief as he would have obtained, if S. 174 had been applicable.⁹⁵ But S. 54 of Act 1 (B. C.) of 1907 renders inapplicable the provisions of O. 21, r. 89 C. P. C. Act V of 1908 to sales in execution of rent-decrees in Bengal proper, though not in Eastern Bengal, where Act 1 (E. B. C.) of 1908 has not adopted this change.⁹⁶

When an entire tenure is sold in execution of a rent-decree obtained against some only of the tenants and a tenant, not a party to the suit, deposits the money, he can sue his cotenants for contribution according to their respective shares of the judgment-debt but not in respect of the 5 per cent. of the purchase-money.⁹⁷

The order which decides a question whether the judgment-debtor has complied with the requirements of the law for a reversal of the sale is one which decides a question relating to title to, or to some interest in, the land as between the parties having conflicting claims thereto and is appealable.⁹⁸ When the auction-purchaser is a stranger, no suit is maintainable to set aside the sale, but the propriety of an order refusing to set aside a sale can be called in question by an application under S. 115 C. P. C. Act V of 1908.⁹⁹

When a sale is set aside at the instance of a transferee of a portion of a non-transferable occupancy holding, he cannot recover

95. Janardhan v. Kali Krishto 23 Cal. 393 ; Bungshi Dhar v. Kedarnath 1 C. W. N. 114.

96. S. 170 B. T. Act VIII of 1885.

97. Suchand v. Balaram 38 Cal. 1 ; Mahendra v. Bhunban 12 C. L. J. 566.

98. S. 153 B. T. Act VIII of 1885 ; Raghubar Doyal v. Jadunandan 16 C. W. N. 736 ; Beni Madhab v. Bissessur 17 C. W. N. 84, 16 C. L. J. 512 ; Kali

Mandal v. Ramsarbaswa 32 Cal. 957 (F.B.) ; 9 C. W. N. 721 ; 1 C. L. J. 476 ; Gauna Charan v. Soshi Bhutan 32 Cal. 572 ; 1 C. L. J. 255 ; Safar Ali v. Raj Mohun 1 C. L. J. 454.

99. Rahim Bux v. Nundo Lal 14 Cal. 321 ; Kabilaso v. Raghu Nath 18 Cal. 481 ; Jugobundhu v. Jadu Ghosh 15 Cal. 47 ; Jogodanund v. Amrita Lal 22 Cal. 767.

mesne profits for the period he was out of possession from the landlord, who himself purchased the holding in execution of his rent-decree, in as much as he could not have obtained a decree for possession against the landlord if he brought such a suit.¹⁰⁰ O. 21, r. 91 C.P.C. Act V of 1908 which allows application to set aside a sale, on the ground of the person whose property has been sold, having no saleable interest therein, does not apply to sale in execution of a rent-decree; as the rent is a first charge upon the tenure and holding, they are liable to be sold for arrears of rent in respect of them, no matter in whose hand they may be at the time of sale.¹⁰¹

Where a tenure or holding is sold in execution of a decree for arrears of rent, in respect of the entire tenure or holding due to all the co-sharers who have all been made parties to the suit, or of a decree for damages under S. 186 A, the tenure or holding shall, subject to the provisions of S. 22, pass to the purchaser.¹⁰² The purchaser acquires the tenure or holding free from all incumbrances and undertenures created by the defaulter.¹⁰³ He is entitled to be put in possession of the entire tenure as it originally stood.¹⁰⁴ The right to hold nijjote lands passes to him.¹⁰⁵ Where a landlord obtains an order for sale under S. 163 B. T. Act VIII of 1885, there is an assertion at the time of the sale that the property is at least an occupancy holding. Hence, if the purchaser takes the property on the faith of this assertion, it is not open to the landlord to contend that what has been sold is the interest of an under-riayat.¹⁰⁶ Where a share in a tenure has been duly recognised by both the landlord and tenant as constituting a distinct tenure, the purchaser acquires the right of a purchaser of an entire tenancy.¹⁰⁷ When by private arrangement amongst coshares, one of them is in exclusive possession of a certain portion of joint land, the purchaser of the right, title and interest of the latter is entitled to be placed in the same position

Purchaser's
title.

100. Safaraddi v. Durga Prosad 16 C. L. J. 83.

nath v. McAllister 6 W. R. (Act X) 34; Mohooddeen v. Ram Kishore 22 W. R. 311.

101. 174 (3) B. T. Act VIII of 1885.

104. Teelottuma v. Brojo Lall 8 W. R. 478.

102. S. 158B B. T. Act VIII of 1885.

105. Joy Dutt v. Bayee Ram 7 W. R. 40.

103. Durga Prasanna v. Kalidass 9 C. L.R. 449; Dwarkanath v. Manick Chunder

106. Abdul Sobhan v. Nekbar Mandal 17 C. L. J. 652.

3 W. R. 197; Kalee Kunt v. Romonee Kant 3 W. R. 217; Doorga Churn v.

107. Somir Jama v. Mohabharat 16 C. W. N. 777.

Anund Moyee 3 W. R. 127; Jan Ali v. Sujeena 6 W. R. (Act X) 36; Taruck-

LECTURE VII. as the vendor.¹⁰⁸ A cosharer landlord who has purchased the holding in execution of a decree of his own cannot raise the question of the transferability of the holding in a suit by the mortgagee.¹⁰⁹

It is competent to a landlord to maintain his suit against any one of several joint tenants who made a separate promise to pay the whole amount but the decree cannot be considered as a rent decree and the sale in execution passes only the right, title, interest of the judgment-debtor and not the tenure or holding.¹¹⁰ So also, where a tenure is sold without a second proclamation as required by S. 165 B. T. Act VIII of 1885, the sale must be held to have been an ordinary Court-sale and the purchaser merely acquires the right, title and interest of the judgment-debtor.¹¹¹

Arrears of rent due to a landlord by a Hindoo widow in possession of her husbands' property, are not a personal debt of the widow and on a sale of the property in execution of a decree against the widow for arrears of rent, the purchaser acquires the property absolutely and not merely the rights of the widow.¹¹² But when in execution of a decree for arrears of rent against a Hindu widow, the tenure itself is not sold but another property, the purchaser acquires the widow's interest in it.¹¹³ When the decree was obtained against a Hindu daughter during her lifetime but execution was applied for against the reversioners, her sons, as representing the estate of the daughter, the decree-holder cannot proceed against the property inherited by the sons.¹¹⁴

Again, a sale, though only of the right, title and interest of the judgment-debtor, passes the right, title, and interest not only of the

108. Kumudini v. Rasik Lal 11 C. W.

N. 517.

109. Ayemuddin v. Sush Chandra 11 C. W. N. 76; Haro Chandra v. Umesh Chandra 11 C. W. N. 71; 11 C. L. J. 20.

110. Rameswar v. Jaideb 12 C. L. J. 591; Jogendra v. Nogendra 11 C. W. N. 1026; Kashikinkar v. Satyendra Nath 12 C. L. J. 612; Chandra Nath v. Protap Udai 18 C. W. N. 170; Abdul Rab v. Egger 35 Cal. 182; 12 C. W. N. 160; Mahanund v. Buni Madhub 24 Cal. 27; Rash Behary v. Peary Mohan 1 Cal. 316; 3 C. L. R. 116; Gopinath v. Kashinath 13 C. W. N. 412; 9 C. L. J. 234.

111. Banbihari v. Khetra Pal 35 Cal.

923; 16 C. W. N. 259.

112. Teluck Chunder v. Muddon Mohun 12 W. R. 504; 15 B. L. R. 113n; Anind v. Mohindra 15 W. R. 264; Zulhoorul Huq, v. Gooroo Churn 15 W. R. 329; Rajaram v. Sonatun 23 W. R. 401; Nugender v. Sreenatty Dosse 11 Moo. 211; 8 W. R. 17; Court of Wards v. Ramaput 11 Moo. 605; 17 W. R. 479; 10 B. L. R. 294.

113. Mohina Chunder v. Ram Kishore 23 W. R. 171; 15 B. L. R. 142; Mahomed Sadat Ali v. Hara Sundari 16 C. W. N. 1070.

114. Kristo Gobind v. Hem Chunder 16 Cal. 511.

registered tenant but also of the unregistered co-owners whom he represented, or who can shew no sufficient cause for not registering their names.¹¹⁵ The question, whether one of the heirs of the original tenant represents the tenancy on behalf of the others, is a question of fact.¹¹⁶ The *onus* is upon the landlord to show that the tenant against whom the decree was obtained was the sole recorded tenant.¹¹⁷ But a sale, in execution of a decree obtained against some of the heirs of the recorded tenant, does not pass the holding, where the landlord accepted rent for some time from all the heirs.¹¹⁸ Where an occupancy holding is sold in execution of a decree for rent obtained against the recorded tenant, it does not pass the interest of the tenants whose names are not registered in the landlord's sherista, as the law does not require such registration.¹¹⁹ An unregistered transferee not recognised by the landlord is bound by a decree against the registered tenant and cannot question the validity of the sale in execution therein,¹²⁰ but he can contest a sale fraudulently obtained.¹²¹ At a sale under S. 105 Act X of 1859, the tenure passes but under S. 108 only the right, title, and interest of the judgment-debtor in the tenure passes.¹²²

The purchaser takes the tenure or holding subject to the "protected interests," but with power to annul all "incumbrances" i.e., rights or interests created by the tenant in limitation of his own interests therein.¹²³ The tests to be applied to determine whether

Protected
interests.

115. Jeo Lal v. Gunga Pershad 10 Cal. 996; Rajani Kant v. Uzir Bibi 7 C.W.N. 170; Tara Lal v. Sarobar Singh 27 I.A. 33; 27 Cal. 407; 4 C. W. N. 533; Nitayi Behari v. Hari Govinda 26 Cal. 677; Soshi Bhusun v. Gagan Chunder 22 Cal. 364; Shamchand v. Brojonath 21 W.R. 94; 12 B.L.R. 484; Ananda Kumar v. Hari Das 27 Cal. 545; 4 C. W. N. 608.

116. Chamatkari v. Triguna Nath 17 C. W. N. 833; Gagan Sheikh v. Abejan Khatun 14 C. L. J. 180; Jagat-tara v. Daulati Bewa 37 Cal. 75; 13 C. W. N. 1110; Afraj Mollah v. Kulsumannessa 10 C. W. N. 176; Ruprau v. Iswar 6 C. W. N. 302.

117. Baikanta v. Thakur Debendra 11 C. W. N. 676.

118. Annada Kumar v. Hari Das 27

Cal. 545; 4 C. W. N. 608.

119. Ashok Bhuiyan v. Karim Bepari 9 C. W. N. 843; Umesh Chandra v. Gour Lal 10 C. W. N. 1042; Afraz Mollah v. Kulsumannessa 10 C. W. N. 176; 4 C. L. J. 68.

120. Gopinath v. Sajani Kanta 10 C. W. N. 240; Azgar Ali v. Asaboddin 6 C. W. N. 134; Surendra Narain v. Gopi Sundari 32 Cal. 1031; 9 C. W. N. 821; Patit Sahu v. Hari Mahanti 27 Cal. 789; 5 C. W. N. 126.

121. Jagan Nath v. Watson & Co. 19 Cal. 341; Damoodur v. Nimanund 15 W.R. 365; Gunga Doss v. Ranunarain 7 W.R. 183 (F.B.).

122. Niladri v. Bichitranaanda 12 C. L. J. 158.

123. Ss. 158 B., 160, 161 B. T. Act VIII of 1885.

LECTURE VII. the purchaser acquires these rights are (1) whether the tenure is sold and (2) whether the decreee is for rent.¹²⁴ He is entitled, after service of notice annulling incumbrances, to realise rent direct from the raiyats superseding the incumbrances.¹²⁵ He acquires a preferential title to the mortgagee who purchases in execution of a mortgage-decree.¹²⁶ A raiyat holding at fixed rates does not, after twelve years' occupation, become a "Settled Raiyat" of the village and thus acquire a right of occupancy, so that his interest is not a protected interest.¹²⁷ Any right or interest created with the express written consent of the landlord is a protected interest.¹²⁸ The word, "plantation" in S. 160 (c), includes an assemblage of growing plants of any kind. But whether or not a particular assemblage of plants comes within it is a question of fact. A betel leaf *boroj* may be a plantation.¹²⁹

Incumbrance. The word, "incumbrance," includes not merely an incumbrance actively created but also an incumbrance created by laches or acquiescence, wilful or arising from negligence, such as, the statutory title acquired by 12 years' adverse possession.¹³⁰ A sale, gift, mortgage, lease, or exchange is an incumbrance.¹³¹ But when a mortgagee has enforced his lien and obtained a decree, it is no longer an incumbrance.¹³² A mortgage created by operation of law, e.g., under S. 171 by payment of the decretal amount to save a tenure or holding from sale is not an incumbrance.¹³³ An under-raiyat's lease may be an incumbrance, but if created in contravention of S. 85, need not be annulled by the superior landlord, auction-purchaser, as an incumbrance.¹³⁴

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| <p>124. Chandra Mohini v. Kenaram
19 C. L. J. 324.</p> <p>125. Manmootho Nath v. Rakhal Chandra 14 C. W. N. 752; 10 C. L. J. 396.</p> <p>126. Gopinath v. Kashinath. 13 C. W. N. 412; 9 C. L. J. 234; Taibatannessa v. Pravabati 10 C. L. J. 640.</p> <p>127. Bhut Nath v. Surendra Nath 13 C. W. N. 1025; 11 C. L. J. 98; Akhil Chandra v. Surendra Nath 11 C. L. J. 87.</p> <p>128. S. 160 (g) B. T. Act VIII of 1885; Mahomed Kazem v. Naffar Chandra 32 Cal. 911; 9 C. W. N. 803; Akhoy Kumar v. Bejoy Chand 29 Cal. 813; Eshan Chunder v. Hurish Chunder 21 W. R. 137; Afazuddi v. Prasanna 39 Cal.</p> | <p>128.</p> <p>129. Banko Behary v. Krishna Chandra 18 C. W. N. 349; 18 C. L. J. 170.</p> <p>130. Munsab Ali v. Arsalulla 16 C. W. N. 831; 16 C. L. J. 539; Gocool Bagdi v. Debendra Nath 14 C. L. J. 136.</p> <p>131. S. 161 (a) B. T. Act VIII of 1885; Jogeshwar v. Abed Mahomed 3 C. W. N. 13; Chundra Sakai v. Kalli Prosanno 23 Cal. 254; Nobin Chand v. Bansenath 21 Cal. 722.</p> <p>132. Akhoy Kumar v. Bejoy Chand 29 Cal. 813.</p> <p>133. Pasupati v. Narayani Dassi 24 Cal. 537; 1 C. W. N. 519.</p> <p>134. Peary Mohun v. Badal Chandra 28 Cal. 205; 5 C. W. N. 310.</p> |
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A sale does not *ipso facto* cancel the incumbrances. It merely gives the purchaser power to cancel them, if he thinks proper.¹³⁵ But the power may be lost by waiver, e.g., by receipt of rent from the undertenure-holder.¹³⁶ The service of the notice is the only sufficient mode to annul the incumbrance, and it is not necessary to bring a suit to extinguish it.¹³⁷

A purchaser having power and desiring to annul an incumbrance may, within one year from the date of *actual* sale and not the date of *confirmation* of the sale, or from the date on which he first has notice, that is, knowledge or information of the incumbrance, whichever is later, present to the Collector an application in writing to serve a notice on the incumbrancer declaring that the incumbrance is annulled and the incumbrance shall be deemed to be annulled from the date on which it is so served.¹³⁸ But an incumbrancer who denying the purchaser's title to issue notice to annul the incumbrance involved him in a litigation to prove his title cannot, by causing the delay, be allowed to say that the sale perfected on the date of the *actual* sale and not on the date where title was *confirmed* by the decision in the suit.¹³⁹ If the application for issue of the notice to serve on the persons jointly interested in the incumbrance is not made within the time, it is not effective against any of them.¹⁴⁰ As the period of limitation is governed by B. T. Act VIII of 1885, a minor is not entitled, even if S. 7 Limitation Act IX of 1908 applied, to a fresh period of limitation.¹⁴¹ A portion of an undertenure cannot be an annulled.¹⁴² Nor, can a purchaser annul an incumbrance without annulling a

LECTURE VII.
Mode of
avoiding
incumbrances.

135. Peari Lal v. Moheswari 25 Cal. 551; Titu Bibi v. Mohesh 9 Cal. 683; 12 C. L. R. 304; Beni Prosud v. Rewat Lall 21 Cal. 746; Satyasarun v. Mohesh Chandra 12 Moo. 263; 2 B.L.R. (P.C.) 23; 11 W. R. (P.C.) 10; Madhusudan v. Ramm Dhan 12 W. R. 383; 3 B. L. R. A. C. 131; Umitsundari v. Birbul Mandal 3 B. L. R. 183; 11 W. R. 563.

136. Tara Chaud v. Waknoonissa 7 W. R. 91; Bistab Charan v. Akhil Chandra 11 C. W. N. 217.

137. Peari Lal v. Moheswari 25 Cal. 551; Soshi Bhaisun v. Gagan Chunder

22 Cal. 361; Chundra Sakai v. Kalli Prosuno 23 Cal. 254.

138. S. 167 B. T. Act VIII of 1885. See Yusuf Gazi v. Asmat Mollah 17 C. W. N. 410; 16 C. L. J. 131.

139. Tibatannessa v. Pravabati 10 C. L. J. 610.

140. Delaney v. Rohamat Ali 32 Cal. 710.

141. S. 181 B. T. Act VIII of 1885. See Akhoy Kumar v. Bejoy Chaud 29 C.J. 813.

142. Sooharam v. Doorga Charan 5 C. L. J. 264.

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superior incumbrance directly subordinate to the interest purchased.¹⁴³ A person seeking to annul an incumbrance shall make out a case that it is an incumbrance ; it is not for the defendant to prove that it is protected.¹⁴⁴ But if the defendant pleads that it is protected, the *onus* is shifted on him.¹⁴⁵

Notice to incumbrancer is necessary.

Where the purchaser and the incumbrancer are the same person, notice is not necessary.¹⁴⁶ So where an underraiyati lease was created by an unregistered instrument, a landlord purchasing the holding of the raiyat is entitled to take *khas* possession by ejecting the underraiyat without annulling the same by a notice, as the underraiyati lease is invalid.¹⁴⁷

It is obligatory upon the purchaser to shew that notice has been served in the prescribed manner and until it is served the incumbrance subsists.¹⁴⁸ The service of notice upon an incumbrancer is no bar to his making an application to set aside the sale.¹⁴⁹ A purchaser of an undivided share of land cannot annul an incumbrance.¹⁵⁰ Nor, can one of several tenure-holders for whose default the tenure was sold avoid an incumbrance, by purchase of the tenure.¹⁵¹ The landlord purchasing a tenure in execution of a rent-decree cannot oust a mortgagee without annulling the incumbrance.¹⁵² But an execution-purchaser subsequently purchasing a holding in execution of a rent decree can annul an incumbrance.¹⁵³

No form of notice has been prescribed. A notice is not bad though it does not specify the particulars of the land and the rent

143. Mafizuddin v. Ashutosh 14 C. W. N. 352; 11 C. L. J. 140.

144. Hari Moni v. Moti Sheikh 16 C. W. N. 779; Narmada Sundari v. Tarip Mollah 13 C. W. N. 720; 9 C. L. J. 490; Gobind v. Reily 13 Cal. 1.

145. Forbes v. Mahomed Hossein 12 B. L. R. 210 P. C.; 20 W. R. 44; Iswar Chandra v. Bistu Chandra 3 B. L. R. App. 97; 12 W.R. 32; Srinath v. Sriamunto 8 B. L. R. 240n; 10 W. R. 467.

146. Hem Chandra v. Tafazzul Hosain 8 C. W. N. 332; Mustulla v. Jan Mamud 28 Cal. 12; 1 C. W. N. 735; *contra* Goluk Chunder v. Ram Sunkur 4 C. W. N. 268.

147. S. 85 B. T. Act VIII of 1885; Peary Mohun v. Badal Chandra 28 Cal.

295; 5 C. W. N. 310.

148. Raileay Koer v. Ajodhya Das 7 C. L. J. 262; Delaney v. Rohamat Ali 32 Cal. 710.

149. Brij Kumar v. Dhanukdhari 10 C. W. N. 976.

150. Ahadulla v. Gagan Mollah 2 C. L. J. 10; Runkinkar v. Akhil Chandra 11 C. W. N. 350.

151. Nawab Ali v. Hemanta Kumar 8 C. W. N. 117; Mafizuddin v. Korbad Ali 31 Cal. 393; 8 C. W. N. 115; Fakir Chunder v. Ram Kumar 31 I. A. 195; 31 Cal. 991; 8 C. W. N. 721.

152. Bimbihari v. Khetra Pal 38 Cal. 923; 16 C. W. N. 259.

153. Surendra Mohun v. Bansidhar 12 C. W. N. 110.

payable and though it is addressed to several tenants jointly,¹⁵⁴ A Subdivisional Officer, not specially appointed by the Local Government to discharge the function of a Collector, has no power to issue notice.¹⁵⁵ When the notice was signed by the Deputy Collector "for the Collector" in charge, there was no irregularity.¹⁵⁶ But where the action of the Deputy Collector was approved by the Collector after the lapse of one year the notice was bad.¹⁵⁷ The Collector's functions in the service of the notice are ministerial and he has no power to amend a notice formerly issued to a wrong person, so as to issue a fresh notice on the real incumbrance after the period of limitation of one year.¹⁵⁸ The service of notice may be made in the manner prescribed for the service of summons in C. P. C. Act V of 1908.¹⁵⁹

The incumbrance is annulled from the date on which the notice is served on the incumbrancer and not from the date of making the application to the Collector.¹⁶⁰ Where notwithstanding the service of the notice, the defendant, a subtenant, withheld possession of the land from the purchaser, the latter is entitled to the mesne profits to be assessed on the value of the crops raised by the defendant and upon the basis of the rent which the rightful owner had been realising from the tenant before dispossessing.¹⁶¹

The period of limitation for a suit to annul an incumbrance is twelve years from the date when the sale becomes final and conclusive.¹⁶² No previous notice to quit is necessary to maintain such a suit.¹⁶³ Nor does it bar a suit for rent.¹⁶⁴

Where the purchaser has power to annul all incumbrances, he may sue to enhance the rent of the land which is the subject of a protected interest and on proof that the land is held at a rent,

154. *Jogabundhu v. Rasgo Monjan* 5 C. W. N. 272.

155. *Ramdhon v. Surja Narain* 2 C. L. J. 99; *Mohabut Singh v. Umahil Fatima* 28 Cal. 66.

156. *Mahomed Kazem v. Naffar Chundra* 32 Cal. 911; 9 C. W. N. 803.

157. *Ramdhon v. Surja Narain* 2 C. L. J. 99; *Gadadhar v. Bisanta Kumar* 8 C. W. N. 669; *Girish Chandra v. Khagendra Nath* 16 C. W. N. 64; 13 C. L. J. 613.

158. *Nriya Gopal v. Golam Rasool* 28 Cal. 189.

159. *Ananda Gopal v. Nafar Chandra* 18 C. W. N. 259 P. C.

160. *Yusuf Gazi v. Asmat Mollah* 17 C. W. N. 440; 16 C. L. J. 131.

161. *Gopal Chander v. Bhoobun Mohun* 30 Cal. 536.

162. Art. 121 Sch. I Limitation Act IX of 1908; *Harek Chand v. Bejoy Chand* 9 C. W. N. 795; 2 C. L. J. 37.

163. *Arsali Sadigar v. Ram Satya* 7 C. L. J. 191.

164. *Raj Kumar v. Alimuddi* 17 C. W. N. 627.

LECTURE VII. which was not at the time the lease was granted, a fair rent, the Court may enhance the rent to such amount as appears to be fair and equitable. But the rent shall not be enhanced, if the land has been held for a term exceeding twelve years at a fixed rent equal to the rent of good arable land.¹⁶⁵

Purchaser's liability.

Rent being regarded not as accruing from day to day but as falling due only at a stated time according to the contract of tenancy or, in the absence of any contract, according to the general law, the purchaser is liable for the whole instalment of rent accruing due after his purchase but before the confirmation of the sale.¹⁶⁶ But he is not liable for the arrears of rent which became due prior to the purchase, unless the tenure or holding was sold with a notice that it was subject to the liability for such arrears.¹⁶⁷ The arrears accruing due between the date of institution of the suit and the date of sale must be treated as arrears of rent payable by the outgoing tenant whose interest does not cease till the sale is confirmed.¹⁶⁸

A purchaser is bound by the terms of the kabuliat executed by the outgoing tenant as to the instalments and interest on arrears, being an ordinary incident of a tenancy ;¹⁶⁹ but a stipulation for the payment of interest at an unusual and exorbitant rate cannot be supposed to be an incident of a tenancy.¹⁷⁰ The landlord is however bound by any statement in the proclamation of sale.¹⁷¹

Dispossession.

If an occupaney raiyat is dispossessed by the purchaser, such dispossession effected by the act of delivery of possession by the Court is not dispossession by the landlord and the suit to recover possession is not governed by Art. 3, Sch. III B. T. Act VIII of 1885.¹⁷² Nor, where a person, other than the judgment-debtor, is dispossessed by a cosharer landlord who purchased in execution

165. S. 167 (1) of B. T. Act VIII of 1885.

166. S. 53 B. T. Act VIII of 1885. See Satyendra Nath v. Nilkantha 21 Cal. 383.

167. Faez Rahman v. Ramsukh 21 Cal. 169 ; Hiradhan v. Kartik Chandra 6 C. W. N. 877.

168. S. 169 B. T. Act VIII of 1885; Karuna Moyee v. Surendra Nath 26 Cal. 176 ; Matangini v. Steenat 7 C. W. N. 552 ; Bejoy Chaudhury v. Sghir Bhushan 18 C. W. N. 126.

169. Lal Gopal v. Manmatha Lal 32 Cal. 258 ; 9 C. W. N. 175 ; Rajnaraian v. Panna Chand 30 Cal. 213 ; 7 C. W. N. 203.

170. Kali Nath v. Trailokhya Nath 26 Cal. 315 ; 3 C. W. N. 194.

171. Shariat Mondul v. Surja Kant 7 C. W. N. 386.

172. Kamaldhari v. Ramashwar 17 C. W. N. 817, dissenting from Aminuddin v. Ulfatunnesa 9 C. L. J. 131 ; see also Rudra Narain v. Natabar Jena 41 Cal. 52 ; 18 C. W. N. 353 ; 18 C. L. J. 85.

of a decree obtained by another co-sharer landlord, is a suit to eject the purchaser governed by Art. 3, as the dispossession was by the purchaser not in the character of a landlord.¹⁷³

In disposing of the proceeds of a sale in execution of a decree for arrears of rent the following rules, instead of those prescribed by S. 73 C. P. C. Act V of 1908, shall be observed :—

- (a) There shall first be paid to the decree-holder the costs incurred by him in bringing the tenure or holding to sale.
- (b) Next shall be paid to the decree-holder the amount due to him under the decree in execution of which the sale was made.
- (c) Out of the balance there shall be paid to the decree-holder any rent which may have fallen due to him in respect of the tenure or holding between the institution of the suit and the date of the confirmation of the sale.
- (d) The balance, if any, shall upon the expiration of two months from the confirmation of the sale be paid to the judgment-debtor.¹⁷⁴

But where the tenure or holding has been sold in execution of a decree obtained by one or more co-sharer landlords framed under S. 148 A or S. 158 B (1), payment of the amount due under such decree shall be made to the decree-holder and to the other co-sharer landlords in proportion to the amount found to be due to each and out of the balance payment shall be made of the rent which may have fallen due in respect of the tenure or holding between the institution of the suit and the date of the confirmation of the sale, to the decree-holder and the other co-sharer landlords in proportion to their respective shares in the tenure or holding.¹⁷⁵

The charge in respect of any rent falling due between the date of institution of the suit and the date of sale is transferred from the tenure to sale-proceeds and the tenure passes to the purchaser free from all liability created upon it by default of the previous holder.¹⁷⁶ If the judgment-debtor disputes the decree-holder's right to receive any sum on account of rent falling due between

LECTURE VII.
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Disposal of
sale-proceeds

173. Mahomed Khalil v. Hirendra Nath 5 C. L. J. 650; Brojo Kishore v. Suraswati 6 C. W. N. 333; Abhoy Churn v. Shaikh Titu 2 C. W. N. 175.

174. S. 169 (1) B. T. Act VIII of

1885.

175. S. 169 pro. B. T. Act VIII of 1885.

176. Faez Rahman v. Ramsukh 21 Cal. 169.

LECTURE VII. these dates, the Court shall determine the dispute and the determination shall have the force of a decree.¹⁷⁷ The landlord has a preferential claim to the surplus sale-proceeds for the rent for the period up to the confirmation of sale.¹⁷⁸ But he is not entitled to interest on such rent.¹⁷⁹

In the case of a sale with express power to annul all incumbrances, the mortgagee may abandon his lien and claim to have it transferred to the surplus sale-proceeds.¹⁸⁰ A suit by an unregistered tenant who was a purchaser of a share of the tenure after the date of decree for the recovery of his share of the surplus sale-proceeds is maintenable.¹⁸¹ A suit for a share of the sale-proceeds is not cognizable by a Small Cause Court.¹⁸²

177. S. 169 (2) B. T. Act VIII of 1885.

178. Matangini v. Sreenath 7 C. W. N. 552; Prabal Chandra v. Jadupati 34 Cal. 724; 6 C. L. J. 26; see however Bejoy Chand v. Soshi Bhusan 18 C. W. N. 136.

179. Monindra v. Asar Mahomed 12 C. W. N. exlib distinguishing Bejoy Chand v. S. C. Mookerjee 11 C. W. N. 1106.

180. S. 73 T. P. Act IV of 1882; Nim Chand v. Ashutosh 9 C. W. N. 117; Gobind Sahai v. Sibslut Ram 33 Cal. 878; Nim Chand v. Ashutosh 9 C. W. N. 117; Hem Chandra v. Tafazul Hossain 8. C. W. N. 332.

181. Matangini v. Srinath 7 C. W. N. 552; Ambika Nath v. Aditya Nath, 6 C. W. N. 624.

182. Ram Coomar v. Ram Comul 10 Cal. 388.

LECTURE VIII.

Compulsory Sales in lieu of Partition.

The term, "partition," is applied to the division of property belonging to co-owners and the allotment among them of the parts, so as to put an end to community of ownership between some or all of them. A strict partition must involve a division of the property into portions which are aliquot parts of the whole. A suit for partition is but a compulsory method of acquiring title in severalty to the property subject thereto, which, without such suit, might have been acquired by voluntary conveyances and releases. Ordinarily, the presumption is that partition should be made in kind. In some cases, however, the partition may be made to suit the convenience of the property and of the co-owners by a division into unequal parts, not necessarily aliquot parts, of the whole, those owners who take a larger share than their due making compensation in money or other property to those who take less than their due. This compensation is called money or compensation for equality of portion. The expression, "owelt of partition," formerly in use is now obsolete. The extent to which this kind of partition can be effected in any case depends on the mode of obtaining partition adopted, the nature of the property and the party entitled ; it is strictly partition plus sale.¹

Partition can be effected though the estates of the co-owners are not the same, as where two parties are in joint possession of land under permanent titles which may not be identical and although the plaintiff's title may be liable to forfeiture in events which have not occurred.² In such a case the partition will be limited to the period of the lesser estate. No partition, however, can be effected, unless the parties are interested in ascertainable shares.³

The power of the Court to direct the partition of property by sale and a division of the proceeds is statutory. In any suit in which the Court has jurisdiction to order partition, if it appears to the Court that

What is partition?

Partition by division or sale.

1. Per Jessel M. R., in *Porter v. Lopes* (1877) 7 Ch. D. 358 at p. 366. 24 Cal. 575; 1 C. W. N. 406; *Uma Sundari v. Benode Lal* 24 Cal. 1026; *Baring v. Nash* (1813) I Ves. & B. 551; *Wills v. Slade* (1801) 6 Ves. 498.
2. *Bhagwat Sahai v. Bepin Behari* 37 I. A. 198; 37 Cal. 918; 12 C. L. J. 210; *Bepin Behari v. Bhagwat Sahai* 9 C. W. N. 699; *Hemadri v. Ramani* 230.
3. *Agar v. Fairfax* (1811) 17 Ves. 530.

LECTURE VIII. by reason of the nature of the property to be partitioned, or of any other special circumstances, a division of the property cannot reasonably or conveniently be made and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of the shareholders interested individually or collectively to the extent of a moiety or upwards, direct a sale of the property and a distribution of the proceeds.⁴ The rule applies to the partition of mortgagee-rights in a revenue paying estate.⁵ It is an absolute power of sale on the request of any party, provided the Court is satisfied that it would be more beneficial for the parties interested than a division.⁶ But in the absence of a request for a sale by any of the parties, the Court has no discretion and is bound to order partition.⁷ Any cotenant is obviously entitled to ask for a sale, unless under some disability ; for the sale is but a mode of partition and when a party is entitled to partition he is, to the extent of his estate, entitled to partition by sale ; and on the other hand, when he cannot maintain the proceeding for partition, a sale on his demand cannot be supported.

Request for
sale.

The request for sale may be embodied in the proceedings of the party but may be made independently of pleadings and in Court by the agent duly authorised.⁸ It may be made after the right of the parties have been determined by the preliminary decree.⁹ A request for sale may be made on behalf of any party under disability by any person authorised to act on behalf of such party.¹⁰ But in cases where a request for sale is made on behalf of a party under disability, the Court is not bound to comply with such request, unless after making an enquiry, it is of opinion that the sale will be for his benefit.¹¹ A request for sale may be withdrawn at any time before the order is made.¹²

4. S. 2 Partition Act IV of 1893.

5. Banke Lal v. Shanti Prosad 35 All. 387.

6. Per Jessel M. R., in Drinkwater v. Ratcliffe (1875) L. R. 20 Eq. 528.

7. Mayfair Property Co. v. Jhonston (1894) 1 Ch. 508.

8. Crookes v. Whitworth (1878) 10 Ch. D. 289.

9. Kshirode Chunder v. Saroda Prosad 12 C. L. J. 525; Hiramoni v.

Radha Churn 5 C. W. N. 128 ; Kadir v. Abdul 24 Mad. 639 ; Abdus Samad v. Abdur Razzaq 21 All. 409 ; Hirakore v. Trikamdas 32 Bom. 103 ; 10 Bom. L. R. 23.

10. S. 5 Partition Act IV of 1893.

11. S. 5 Partition Act IV of 1893 ; Rimington v. Hartley (1880) 14 Ch. D. 630 ; Davis v. Ingram (1897) 1 Ch. 477.

12. Williams v. Games (1875) 10 Ch. App. 204 ; Drinkwater v. Ratcliffe

Whether there shall be partition by sale or by allotment is doubtless a judicial question to be determined by the Court, in solving which it may pursue any method of enquiry appropriate to judicial proceedings. When any of the parties in his pleadings makes the allegation necessary to require a sale, this tends an issue which, unless confessed by the other parties in interest, requires a trial before the Court. But the sale may be ordered on the allegation of one party and the admission of the other, either in express terms, or by his failure to deny. The Court will enquire whether it is more beneficial to all the parties interested that the properties should be sold and the proceeds distributed, or the division of the property be made.¹³ If a property cannot be partitioned without destroying the intrinsic value of the whole or of the shares, such partition ought to be made, but where partition cannot be made without destroying the intrinsic value of the property then a money compensation should be given.¹⁴

It is incumbent on any person seeking partition by sale in lieu of partition by allotment, to state the grounds on which he desires a sale so as to bring the case within one of those in which the Court has a discretion or a duty to order a sale. He should state the nature of the property, the number of the parties interested, or any circumstances by reason whereof a sale and distribution of the proceeds is more beneficial than a division of the property among the parties interested.¹⁵ The mere dissent or disability of the other persons interested does not take away the jurisdiction of the Court to order sale and distribution of the proceeds instead of the partition, if it appears to the Court that it will be more beneficial for the parties interested, unless the Court sees good reason to the contrary.¹⁶ In cases in which the propriety of partition by sale appears so obvious that on a request for partition in that mode, the burden of showing good reason rests on those opposing a sale.¹⁷ Such burden will be discharged by showing that great hardships will be inflicted on one of the parties, especially, when the party requesting a sale is

(1875) L. R. 20 Eq. 520; Pitt v. Jones (1880) 5 App. Cas. 651.

13. Powell v. Powell (1874) 10 Ch. App. 130; Waite v. Bingley (1882) 21 Ch. D. 674.

14. Ashanullah v. Kali Kinkur 10 Cal. 675.

15. Evans v. Evans (1883) 52 L. J. Ch. 304.

16. *Rc Langdale's Estate* (1871) 5 I. R. Eq. 572; Pemberton v. Barnes (1871) 6 Ch. App. 685.

17. Lys v. Lys (1868) L. R. 7 Eq. 126.

LECTURE VIII. actuated by vindictive motives,¹⁸ or that the property is such a mere dependence on another property as to be almost valueless except in connection with that property.¹⁹ When it was proved that a partition would be as feasible as a sale and that a partition would cause no loss to the plaintiff, whilst a sale would damage the defendant, and that a vindictive feeling on the part of the plaintiff had brought about the action, it was held that these circumstances constituted a good reason to the contrary and a sale was refused, a partition being directed instead.²⁰ The onus lies on the owners of the smaller shares desiring a sale to show that under all the circumstances a sale is the more beneficial course for all the parties. Where it does not appear that a division cannot be made, a sale should not be directed in the absence of other circumstances to give the court jurisdiction.²¹

Grounds for ordering sale.

Among the causes why partition should be made by sale are that partition by allotment will operate to the great prejudice of the owners, that the property cannot be conveniently used by the parties in interest together and a sale will better promote the interests of the owners, that it will be depreciated in value, or the interests of the owners will be prejudiced, or the property cannot be equally divided, or its division will materially impair its value or result in loss or injury to the parties interested, or that the lands cannot be advantageously divided, or a sale will best promote the interest of the parties, or is manifestly for their interests, or a partition in kind cannot be made without great inconvenience, or the interests of those who are entitled to the subject or its proceeds will be promoted by a sale of the entire subject.

In considering whether a sale is more beneficial than a partition, the Court considers only the pecuniary results, disregarding matters of sentiments, and has regard to the interest of all the parties interested as a whole;²² for example that the property, if sold entire, is likely to fetch a higher price than the allotments, if sold after a partition, would fetch, or that the property consists of different particulars of varying values which it would be difficult to divide into portions of

18. *Saxton v. Bartley* (1879) 48 L.J. Ch. 519; 27 W.R. 615.

(1877) 7 Ch. D. pp. 363, 366.

19. *Re Whitwell's Estate* (1887) 19 L.R. Ir. 45.

21. *Allen v. Allen* (1873) 42 L.J.

Ch. 839; 21 W.R. 842.

20. *Saxton v. Bartley* (1879) 48 L.J. Ch. 519; 27 W.R. 615; *Porter v. Lopes*

22. *Drinkwater v. Ratcliffe* (1875) 20 Eq. 528; *Allen v. Allen* (1873) 42 L.J. Ch. 839; 21 W.R. 842.

equal value,²³ or that a large sum will have to be given for equality of partition, that is, what is substantially a sale is inevitable,²⁴ or that a small property will have to be divided up into a great number of shares.²⁵

As the order for sale is only to be made if the Court thinks fit, some reason must be shown for preferring a sale to a partition where the majority oppose a sale, though it is not necessary to show that it is more beneficial.²⁶ But the fact that the property is an old family property is not sufficient.²⁷ A sale may be ordered though forbidden by the will under which the parties claim.²⁸ When there is no serious difficulty in effecting an actual partition of the premises, to make a decree for sale asked for by a shareholder, would be an arbitrary interference with the rights of property. It would be such an interference as would control owners under color of partition to sell their land against their will. The Court would not, in making such an order, exercise a power inconsistent with both the spirit and the letter of the statute and also with private rights and individual privileges.

In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates, and a sale of the remainder.²⁹ An order for sale made by the Court is a decree within the meaning of S. 2 C.P.C. Act V of 1908.³⁰

Every sale shall be subject to a reserved bidding, the amount of which shall be fixed by the Court.³¹ Any shareholder is at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off, instead of paying the same as to the Court may seem reasonable.³² If two or more persons of whom one is a shareholder in the property, respectively advance the same sum at any bidding, such bidding shall be deemed to be the bidding of the shareholder.³³ The Court may on the application of any of the shareholders offer to

Purchaser.

23. *Pemberton v. Barnes* (1871) 6 Ch. App. 685.

24. *Porter v. Lopes* (1877) 7 Ch. D. 358.

25. *Re Dyer, Dyer v. Paynter* (1886) 54 L. J. Ch. 1133; *Gilbert v. White* (1879) 11 Ch. D. 78.

26. *Richardson v. Feary* (1888) 39 Ch. D. 45; 57 L. J. Ch. 1049; *Allen v. Allen* (1873) 42 L. J. Ch. 839; 21 W. R. 842.

27. *Pemberton v. Barnes* (1871) 6 Ch. App. 685; *Porter v. Lopes* (1877) 7 Ch. D. 358.

28. *Thompson v. Richardson* (1872) 6 I. R. Eq. 596.

29. S. 9 Partition Act IV of 1893.

30. S. 8 Partition Act IV of 1893.

31. S. 6 (1) Partition Act IV of 1893.

32. S. 6 (2) Partition Act IV of 1893.

33. S. 6 (3) Partition Act IV of 1893.

LECTURE VIII. sell the share or shares of the party or the parties asking for sale to such shareholder at a valuation made by the Court ; but if two or more shareholders apply for leave to buy, the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court, and if the applicant or applicants are unwilling to buy at the price so ascertained, all costs of, or incident to, the application shall be borne by him or them.³⁴ But a co-sharer cannot be compelled to transfer his share at a valuation to another, simply because the latter was in possession of the property at the time when the action for partition commenced.³⁵

Dwelling house.

Where the transferee of a share in a dwelling house, belonging to an undivided family, is not a member of the family, he is not entitled to joint possession or other common or part enjoyment of the house.³⁶ Indeed it is inequitable to permit a stranger to intrude himself upon the privacy of a joint family-residence, more particularly when, as happens in many instances, a stranger is actuated by motives of enmity. The position of a purchaser from a member of a family governed by the Mitakshara law, is much worse, because as the member himself could not say that any specific portion was exclusively his, the purchaser could not claim to be put into possession of any definite piece of the property.³⁷ Hence, if such a transferee sues for partition and if any member of the family, being a shareholder, undertakes to buy the share of such transferee, the Court shall make a valuation and direct the sale of such share to such shareholder.³⁸ If two or more members of the family, being such shareholders, severally undertake to buy such share, the Court shall order a sale of the share to the shareholder who offers to pay the highest price above the valuation made by the Court.³⁹ It is only when the suit is for partition that a member of a joint family may buy out the purchaser not being a member of the family. But he is not entitled to do so when the suit has been decreed and the decree for possession is being executed.⁴⁰

34. S. 3 Partition Act IV of 1893.

322.

35. Debendra Nath v. Haridas 15 C. W. N. 552 ; 13 C. L. J. 322.

38. S. 4 (1) Partition Act IV of 1893.

36. S. 44 T. P. Act IV of 1882.

39. S. 4 (2) Partition Act IV of

37. Kshirode Chunder v. Saroda Prosad 12 C. L. J. 525 ; Debendra Nath Haridas 15 C. W. N. 552 ; 13 C. L. J.

1893.

40. Kali Kumar v. Brahmamanda 7 C. L. J. 98.

The word, "family," includes a group of persons related in blood, not necessarily tracing their descent from a common ancestor, nor constantly residing in the dwelling house, nor joint in mess, nor restricted to Hindus only.⁴¹ The fact that the plaintiff, not a member of the family, has purchased in addition to a share of the dwelling houses, a share of the lands as well, does not render this rule inapplicable.⁴²

The word, "house," includes not only the structure or building but includes adjacent buildings, curtilage, garden, courtyard, orchard and all that is necessary for the convenient occupation of the house, and whether any particular plot of land is or is not necessary to the enjoyment of a house, is to be determined upon evidence.⁴³

If the property be sold under a decree or order of the High Court of Calcutta, Madras, or Bombay in the exercise of its original jurisdiction or of the Court of the Recorder of Rangoon, the procedure shall be, as far as practicable, the same as that of such Court in its original civil jurisdiction for the sale of property by the Registrar; if the property be sold under a decree or order of any other Court, such procedure may be adopted as may be prescribed by the High Court in this behalf, and in its absence, the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decree.⁴⁴

There is no doubt of the general power of the Court to vacate or refuse confirmation of the sale. The application to set aside the sale may be made either by the parties to the suit, or the purchaser seeking to be released from his bid. Thus, the sale may be vacated for want of proper notice, or because made at an improper time, or for misconduct of the officer making it, or because of devices to suppress bidding, or because of any fraud practised on a party and operating to his prejudice. Indeed the grounds on which the sale may be set aside are so various as to defy complete enumeration. But sales will not be vacated for mere inadequacy of price, though inadequacy of price is sometimes sufficient evidence of fraud or misconduct. In the majority of cases in which the confirmation of sale is resisted on account of alleged inadequacy of price, the

Confirmation
of sale.

41. Kshirode Chunder v. Saroda Prosad 12 C. L. J. 525; Sultan Begam v. Debi Prasad 30 All. 324; Vaman v. Vasudev 23 Bom. 73.

Prosad 12 C. L. J. 525.

43. Kshirode Chunder v. Saroda Prosad 12 C. L. J. 525.

44. S. 7 Partition Act IV of 1893.

42. Kshirode Chunder v. Saroda

LECTURE VIII. parties are able to point to some irregularity in the proceedings, or some accident, or other cause preventing fair attendance at the sale, or otherwise probably diminishing competition by the bidding, and where such is the case, any considerable inadequacy will result in an order for a resale, rather than a confirmation.

**Grounds for
setting aside
sale.**

The grounds, available to a purchaser to set aside the sale, must relate to some misapprehension or misconduct at, or connected with, the sale whereby he was induced to make a bid, which otherwise he would not have made, or to some defect in the proceedings, the result of which is that he cannot obtain the title sought to be affected by the partition. If the proceedings are adequate to transfer title to the purchaser, irregularities which do not impair his title cannot entitle him to a release from his bid. Nor, can he successfully complain of matters known to him at the time of his purchase and which thereby he must be deemed to have waived, or which could remain unknown to him only through his extreme negligence or inattention to his business. If the bid was made in ignorance of the true title and the making of it resulted from any misrepresentation of the parties, or of the officer making the sale, no Court would hesitate to refuse confirmation. The purchaser is entitled to the protection due to an innocent purchaser, and as such, entitled to rely on the record in the case. On the otherhand, he is bound by such record and chargeable with notice of its condition and of all the facts disclosed thereby and is justly treated, as though he had actual knowledge of such facts.

Sale-proceeds.

The purchaser is not bound to see to the proper application of the purchase-money and his title cannot be impaired by proving the misapplication of the money. The proceeds of sale are distributed, as appears to the Court to be most in accordance with the rights of the persons whose claims have been established, whether these persons are or are not before the Court ; the Court may, however, make such reservation as seems fit in favour of the persons, whether ascertained or not, who may appear from the evidence to the Court to have any *prima facie* right which ought to be provided for, although not fully established. An excluded person, however, is not without remedy ; he may recover from any participating person any portion received by the latter of his share.

The order for sale operates from its date, in the case of a person *sui juris* and absolutely entitled to convert his share into money.⁴⁵

In the case of a person under disability, or a person not absolutely entitled to the share of the sale-proceeds of real estate, the share is to be dealt with as real estate, not only in cases where the sale is made on request of persons, other than those under disability,⁴⁶ but also on the request of the infants acting through next friends.⁴⁷

The rights of those having a lien upon the premises, are protected upon the sale. The protection is by operation of law ; the interest or lien of the lien-holder, if against the whole premises previous to the sale, attaches itself to the whole of the proceeds thereof. If the lien is only against the share or portion of one of the co-sharers, it attaches itself to the share or portion of the proceeds derived from the sale and belonging to such co-sharer. Where a co-sharer before partition has created a mortgage in respect of his undivided interest, the charge for the oweltly will have precedence over the mortgage.⁴⁸

46. *Re Norton, Norton v. Norton* (1881) 17 Ch. D. 241 ; *Foster v. Foster* (1909) 1 Ch. 101. (1875) 1 Ch. D. 588.

47. *Re Norton, Norton v. Norton* (1900) 1 Ch. 101 ; *Hopkinson v. Richardson* (1913) 1 Ch. 284 ; *in re Barker* 35 Cal. 388 ; 12 C. W. N. 373.

48. *Mahomed Kasim v. R. S. Hills*

LECTURE IX.

Compulsory Sales for arrears of revenue in Bengal.

Revenue Sale
Laws since the
Permanent
Settlement.

The general policy of the Revenue Sale Laws that have been passed since the Permanent Settlement, has been to protect the public revenue, by placing the purchaser of an estate sold for arrears of revenue in the position of the person, who at the time of the Decennial Settlement engaged to pay the revenue then fixed. The Legislature, therefore, gave or sought to give the purchaser, the power of abrogating all engagements made by the defaulting Zemindar or his predecessors since the settlement, whereby the zemindaree rents and profits which were the security diminished. The Legislature, however, has not uniformly tried to effect this general object by precisely the same means. The various statutes which it has, from time to time, passed for the purpose, differ in the language of their provisions and in the stringency of the power conferred by them.¹ The law of summary sale for arrears of revenue is a necessary evil, but an evil nevertheless. One of the cardinal objections to it is that in order to secure the public revenue, it places in the hands of an unscrupulous proprietor the power of letting his estate go to sale, for the express purpose of evading the tenures and liens created by him or his predecessors and realizing a higher price than what he would likely obtain in the open market : in other words, of appropriating to himself a second time the market value of all interests which he has already created, in addition to the value of the interests which he has reserved to himself and which only could be transferred by private sale or by a forced sale, held by the Civil Court on account of the proprietor.

Revenue.

The word "Revenue" includes every sum, annually payable to Government by the proprietor of an estate or tenure, held directly under Government in respect thereof, and every sum payable to Government in respect of Takavi, or of any money advanced by

1. Assanoollah v. Obhoy Churn 13
Mo. 317 ; 13 W.R. 24 P.C. The earliest
legislation on this subject was S. 5, Reg.
XIV of 1793, Reg. V of 1796, Reg. XII
of 1796, Reg. VII of 1799, Reg. I of 1801.

Reg. V of 1812, Reg. XVIII of 1814.
These were followed by Reg. XI of 1822,
Reg. XII of 1824, Reg. VII of 1830,
Act XII of 1841 and Act I of 1845.

Government to proprietors of land for making or repairing embankments, reservoirs or water courses, or other improvements on the land held by them.² It includes Malikana.³ Improvement means any work which adds to the letting value of the land and has been defined by S. 2 Act XIX of 1883. If the whole or a portion of a kist or instalment of any month of the era according to the settlement, be unpaid on the first of the following month of such era, the sum, so remaining unpaid, is an arrear of revenue.⁴ Payment must be made kist by kist. The proprietor is not entitled to pay the whole demand of one year on the date fixed for the payment of of the last kist.⁵ Payment of money to the Post Office to be sent to the Collector is not equivalent to payment to the Collector, if it does not reach him in due time.⁶ But when the money sent by the Post Office is accepted, it is the duty of the Collector, under Land Revenue Rules No. 29 to point out a mistake in giving the correct towzi number, so as to give the remitter an opportunity to correct the mistake.⁷

Where a payment, made in respect of arrears of revenue, was appropriated to the satisfaction of a particular kist, and accepted and acknowledged as paid on that account, the effect of the transaction cannot be varied by altering the appropriation originally made.⁸

The Board of Revenue at Calcutta shall determine, upon what dates all arrears of revenue and all demands recoverable as arrears of revenue, shall be paid, in default of which the estates and tenures shall be sold at public auction to the highest bidder. Notice of the dates so fixed, shall be given in the official Gazette in the office of the Collector, in the Courts of the Judge, Magistrate and Munsiffs and at the Thana stations of each district. The dates so fixed, shall not be changed, except by the said Board, by similar advertisement and notification, issued at least three months before the close of official year, preceding that in which the new dates are to take effect.⁹ Want of due publication will render the rule, framed by

Last day for payment of revenue.

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| <p>2. S. 1 Act VII (B. C.) of 1868.</p> <p>3. Bageswari v. Gawhar 31 I. A. 52 ;
31 Cal. 256 ; 8 C. W. N. 649.</p> <p>4. S. 2 B. L. R. S. Act XI of 1859.</p> <p>5. Kali Prosummo v. Krishna Chandra
7 C. W. N. 570.</p> <p>6. Baikantha Nath v. Gunga Prosad
4 C. W. N. 103.</p> | <p>7. Hamid Hossein v. Mukhdum
Reza 32 Cal. 229 ; 9 C. W. N. 300.</p> <p>8. Mahomed Jan v. Ganga Bishun 38
I. A. 80 ; 38 Cal. 537 ; 15 C. W. N.
443 ; 13 C. L. J. 525 ; 10 Ind. Cas. 272
setting aside Ganga Bishun v. Mahomed
Jan 33 Cal. 1193 ; 10 C. W. N. 948.</p> <p>9. S. 3 B. L. R. S. Act XI of 1859.</p> |
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LECTURE IX. the Board of Revenue, *ultra vires*.¹⁰ Where by the terms of the Kabuliat the jama would be paid within the 28th June every year, it would not be in arrear until the 1st July next; and when by a notification, issued by the Board of Revenue, 28th June of each year was fixed as the latest day of payment of rent of all descriptions, in default of which the tenure in arrear would be sold, 28th June 1903 was the first date when the tenure would be liable to be sold, in default of payment of revenue, payable under the Kabuliat on the 28th June 1902.¹¹

Other demands.

When the arrears are (1) other than those of the current year or of the year immediately preceding (2) or due on account of estates other than that to be sold (3) or of estates under attachment by order of any judicial authority or managed by the Collector in accordance with such order or (4) due on account of Takavi, poolbundi or other demands, not being land revenue but recoverable by the same process as arrears of land revenue, no estate and no share or interest in any estate shall be sold, otherwise than after a notification, specifying the nature and amount of the arrear or demand and the latest date on which payment thereof shall be received, shall have been affixed for at least fifteen days, preceding the latest day of payment, fixed as above by the Board of Revenue, in the office of the Collector in the Courts of the Judge and Munsiff and in the Police Thanas of the division in which the estate or share of an estate to which the notification relates, is situated and also at the cutcherry of the mal-guzar or owner or at some conspicuous place upon the estate or share of an estate, the same being certified by the peon or other officer employed for the purpose.¹²

Thus, the embankment charges, ordered to be levied under the P. D. R. Act I (B.C.) of 1895 cannot be treated as arrears of land revenue, unless and until notice is issued under S. 5 Act XI of 1859.¹³ The current year means the year in which the latest date of payment falls, as fixed above, and not the year in which the sale takes place.¹⁴ When in pursuance of the notification, money was sent and received, the amount being in excess of the arrear in question but less than the

10. Mahomed Jarip v. Shiyama Sundari 8 C. W. N. 826.

11. Buksh Elahi v. Durlav Chandra 39 I. A. 177 ; 39 Cal. 981 ; 16 C. W. N. 812 ; 16 C. L. J. 620.

12. S. 5 B. L. R. S. Act XI of 1859

13. Hari Das v. Dhiraj Chandra 15 C. W. N. 38.

14. Jahumovi v. Sec. of State 7 C. W. N. 377 ; Bhawani Koar v. Afzal Hussain 34 Cal. 381 ; 5 C. L. J. 125.

revenue due on the date, the payment should have been appropriated.¹⁵ But a sale, held not only for arrear specified in the notification, but also for arrear that accrued subsequently, is not bad.¹⁶ The object of the notification is to protect the interests of the attaching creditor.¹⁷ Hence, the non-issue of a notification is a mere irregularity.¹⁸

All estates under attachment, whether or not managed by the Collector, are entitled to the benefit of a special notification, though it is not necessary that the whole estate should be under attachment.¹⁹ But an estate for which a common manager has been appointed under S. 95 B.T. Act VIII of 1885, is not an "estate under attachment."²⁰ The attachment to have effect must be made at least before the date fixed for sale, that is, before the notification has been issued.²¹

No payment or tender of payment of revenue after the latest day of payment shall bar or interfere with the sale.²² But if the Government demand be not actually arrears of revenue, the Collector is bound to accept the amount, if tendered before the property is actually sold.²³

To guard against accidental sales of estates for non-payment of arrears of revenue, recorded proprietors or copartners of estates are authorised to deposit with the Collector money or Government securities, endorsed or made payable to his order, and to sign an agreement pledging the same to Government as security for the revenue of the entire estates, and authorising the Collector to apply the money or securities to the payment of any revenue due from the estates, not being paid before the sunset of the latest day of payment, fixed by the Board of Revenue; so long as any money or securities, sufficient to cover any arrear that may fall due, shall remain in the

Protection
from sale.

(i) Deposit
(a) by pro-
prietor,

15. *Jogendra Mohan v. Uma Nath* 35 Cal. 636; 12 C. W. N. 646; S. C. L. J. 41.

16. *Bageswari v. Gowhar* 31 I. A. 52; 31 Cal. 256; 8 C. W. N. 649.

17. *Bunwari Lall v. Mohabir Persad* 1 I. A. 89; 12 B. L. R. 297; *Gonesh Persad v. Brij Behary* 1 C. L. J. 565.

18. *Jotindra Mohan v. Jogendra Nath* 11 C.W.N. 1107; 6 C. L. J. 99; *Deonandan v. Manbedh* 32 Cal. 111; 8 C. W. N. 757.

19. *Mohabeer Persaud v. Coll. of*

Tirhoot 13 W. R. 423; S. C. on appeal *Bunwari Lall v. Mohabir Persad* 1 I. A. 89; 12 B. L. R. 297.

20. *Bhawani Koer v. Afzal Hussain* 31 Cal. 381; 5 C. L. J. 425.

21. *Nownit Lal v. Radha Kristo* 22 Cal. 738.

22. S. 6 B. L. R. S. Act IX of 1859; see *Azimuddin v. Sec. of State* 21 Cal. 360.

23. *Mohan Ram v. Shib Dutt* 17 W. R. 21; 8 B. L. R. 230.

LECTURE IX. hands of the Collector, the estates for the protection of which such deposit was made, shall be exempted from sale for arrears of revenue.²⁴ No claim to abatement or remission of revenue, unless allowed by the authority of Government, nor any private demand or cause of action against Government shall bar a sale. But where money, in the hands of the Collector sufficient to pay the arrear of revenue, stands in the defaulter's name alone and without dispute and the Collector has neglected or refused on insufficient grounds to transfer it after application in due time in payment of the arrear of revenue due, the sale is invalid.²⁵

(b) by other persons.

The Collector may, at any time before sunset of the latest day of payment, receive as a deposit from any person, not being a proprietor, the amount of the arrear of revenue, due to be credited in payment of the arrear at sunset, unless before that time the arrear shall have been paid by the defaulting proprietor. If the person so depositing whose money shall have been so credited by a party in a suit before a Court for the possession of the property in arrear, it shall be competent to the said Court to put him into temporary possession of the said property upon taking security from him. If the deposit were made to protect an interest of the person depositing which would have been endangered or damaged by the sale, he shall be entitled to recover the amount of the deposit with or without interest, as the Court may determine, from the defaulting proprietor. If the deposit was necessary to protect any lien on the property, the amount credited shall be added to the amount of the original lien.²⁶

A suit against Government, to recover money paid under protest, in satisfaction of a claim made by the revenue authorities on account of demands recoverable as such arrears, must be brought within one year from the date when the payment is made.²⁷ An objection to the Collector against the payment and subsequent infructuous appeal to the Commissioner are equivalent to "protest."²⁸

A cosholder who has paid the whole revenue acquires no charge on the share of his defaulting cosholder.²⁹ But if he be also a

24. S. 15 B. L. R. S. Act XI of 1859.

27. Art. 16 Sch. I Limitation Act IX of 1908.

25. S. 8 B. L. R. S. Act XI of 1859.

28. Kebal Rua v. Government 5 W. R. 47.

See Balkishen v. Simpson 25 I. A. 151;

29. Moti Chaud v. Bajrang Sahai 16 C. L. J. 118; Jussoda v. Mutunginee

25 Cal. 833; 2 C. W. N. 513; Harkloo

12 W. R. 249; Kiu Ram v. Mozaffer

Singh v. Bainsidur Singh 25 Cal. 876;

2 C. W. N. 360.

26. S. 9 B. L. R. S. Act XI of 1859.

mortgagee of the share he is entitled to have, on general principles of justice, equity and good conscience, not only a personal decree against the mortgagor but also the amount paid by him on account of revenue added to the amount of the original lien.³⁰ A cosharer is entitled to claim contribution from his cosharers.³¹ It is the duty of the Court to apportion the separate liabilities of each cosharer.³² Where the sharers are not in possession of each of the same share in the villages, the extent of liability of the defaulting cosharers for contribution, is to be determined with reference to the assets accepted as the basis at the time of the Permanent Settlement and not upon the assets at the time of the default.³³ In a suit for contribution, where the plaintiff asks for relief against all the defendants separately, the Appellate Court may, on appeal by one of the defendants, alter the decree so as to make another defendant liable.³⁴ But a cosharer, paying an arrear of revenue due by a defaulting cosharer, who has a separate account before the share of such defaulter has been put up for sale under S. 13 Act XI of 1859, cannot claim to be reimbursed by such defaulter,³⁵ unless he believed in good faith that his interest would be endangered by the sale.³⁶ A mortgagee in possession, making payment of revenue, is entitled to add the amount to the principal money.³⁷ A putnadar or a person in possession under a decree of Court, though subsequently reversed, is entitled to recover the money from the Zemindar.³⁸ A suit for

Hossain 14 Cal. 809 (F.B.) ; Khub Lall v. Pudmanund 15 Cal. 542 ; Gopi Nath v. Ishur 22 Cal. 800.

30. Nugender v. Sreemutty Dosse 11 Moo. 241 ; 8 W. R. 17 P. C. ; Upendra Chunder v. Tara Prosanna 30 Cal. 794 ; 7 C. W. N. 609 ; Smith v. Dinonath 12 Cal. 213 ; Premchand v. Purnima Debi 15 Cal. 546 ; see Raja of Vizianagram v. Raja of Setrucherla 26 Mal. 686 ; Ibn Hasan v. Brijbhukan 26 All. 407 (F. B.) at p. 420.

31. S. 69 I. C. Act IX of 1872 ; Bykuntnath v. Gooroo Churn 7 W. R. 247 ; Juggobundhoo v. Fyez Buksh 8 W. R. 166 ; Radha Madhub v. Ram Runjun 17 W. R. 461 ; Sham Lall v. Huro Soon-duree 5 W. R. 29.

32. Nobin Mohun v. Gopal Chunder 11 W. R. 355 ; Kristo Monee v. Buroda

Dossia 14 W. R. 143.

33. Lal Mohan v. Nanda Lal 15 C. L. J. 191.

34. Rup Jan v. Abdul Kadir 31 Cal. 643 ; 8 C. W. N. 496 (F. B.) ; Upendra Lal v. Girindra Nath 25 Cal. 565 ; 2 C. W. N. 425 ; Hudson v. Basdeo 26 Cal. 109 ; 3 C. W. N. 76.

35. Kishen Chunder v. Muddun Mohun 7 W. R. 365.

36. Smith v. Dinonath 12 Cal. 213.

37. S. 72 T. P. Act IV of 1882 ; Jussoda v. Mutunginee 12 W. R. 249.

38. S. 69 I. C. Act IX of 1872 ; Smith v. Dinonath 12 Cal. 213 ; Bama Sundari v. Adhar Chander 22 Cal. 28 ; Dakhina Mohun v. Saroda Mohun 29 I. A. 160 ; 21 Cal. 142 ; Chinnasamy v. Rathnasudrapathy 27 Mad. 335.

LECTURE IX.

contribution is not cognizable in a Small Cause Court.³⁹

(ii) Attachment.

Estates which are under the charge of the Court of Wards or which are the sole property of a minor, are exempt from sale for arrears of Government revenue which have accrued whilst such estates have been under charge of the Court of Wards.⁴⁰ A prohibitory order under the Cess Act IX (B.C.) of 1880 forbidding payment of rent to any one but the Collector until the arrears due for road-cess is satisfied, is both in form and substance an attachment.⁴¹

In Bengal no settled estate or part thereof shall, without the previous sanction of the Local Government, be sold during the life of any tenant for life thereof for an arrear of land revenue or for any other arrear recoverable as an arrear of land revenue.⁴²

(iii) Order of Collector or Commissioner

The Collector or other officer conducting the sale and the Commissioner of Revenue may, at any time before the sale exempt an estate from sale, provided the reason for granting such exemption has been recorded in a proceeding and where the order for exemption is issued by the Commissioner it is received by the Collector or other officer before the sale.⁴³ Mere payment of arrears into the Collector's Treasury without an express order has not the effect of exempting the estate from sale.⁴⁴ The order must be an absolute exemption and must not depend on an act which may or may not be performed.⁴⁵ When the Collector has acknowledged payment in full of the arrear before sale and elected to proceed to sale by certificate procedure against an arrear of different character, he cannot proceed to sell the property under the land revenue proclamation without issuing a notice under S. 5 Act XI of 1859 on the ground that no special exemption order has been passed.⁴⁶

Notification of sale.

After the latest day of payment the Collector shall issue notifications of sale in the language of the district, to be affixed in his office

39. Cl. 41 Sch. II P. S. C. C. Act IX of 1887; see Sreeputty v. Loharam 7 W. R. 1384 (F. B.); Nobin Krishna v. Ram Kumar 7 Cal. 605; 9 C.L.R. 90.

40. S. 17 B. L. R. S. Act XI of 1859; Ss. 23, 24, 25 Court of Wards Act IX (B. C.) of 1879.

41. Gobind Lal v. Ramjanam 20 I. A. 165; 21 Cal. 70.

42. S. 33 Settled Estates Act III (B. C.) of 1904.

43. S. 18 B. L. R. S. Act XI of 1859.

44. Gobind Chuunder v. Sherajunnissa 13 C. L. R. 1; Chutturbhoj v. Ishri Mul 21 Cal. 844.

45. Gauri Shankar v. Janki Pershad 17 I. A. 57; 17 Cal. 809; Muhammad Aga v. Jadunandan Jha 10 C. W. N. 137; 2 C. L. J. 325.

46. Hari Das v. Dhiraj Chandra 15 C. W. N. 35.

and in the Court of the Judge of the district and to be published in the official Gazette, if the revenue payable exceeds Rs. 500, specifying the estates or shares of estates which will be sold and the day on which the sale of the same will commence, which day shall not be less than 30 clear days from the date of affixing the notification in the Collector's office.⁴⁷ When the revenue payable exceeds Rs. 500, the publication of a notification in the Calcutta Gazette is sufficient.⁴⁸

The object of the notification is to give the intending purchasers correct information as to the precise property to be sold. The kist in respect of which the arrears have accrued need not be specified.⁴⁹ Though the notification need not contain the names of all the recorded proprietors,⁵⁰ the entry of the name of a wrong proprietor, misleading intending bidders, is an irregularity.⁵¹ Nor, is it necessary to specify the name of all the mauzas as included in the property to be sold ; all that is necessary is to specify the estate or share of estate and the number it bears in the Collector's office. The specification need not give the exact share to be sold, but if there is sufficient indication as to what precise share will be sold, that is enough.⁵² But where the share could not be ascertained from the notification, there was a material irregularity.⁵³

The date fixed for the sale must be clear 30 days from the date of affixing the notification.⁵⁴ A defect in the sale notification is a mere irregularity which does not render the sale a nullity.⁵⁵

47. S. 6 B. L. R. S. Act XI of 1859.

Pershad 13 Cal. 208 ; Ram Prasad v. Pawan Singh 18 C. L. J. 97.

48. Radha Charan v. Sharfuddin 41

Cal. 276 ; 17 C. W. N. 1135.

49. Luleeta v. Coll. of Tirhoot 19 W. R. 283.

50. Sec. of State v. Rashbehary 9 Cal. 591 ; 12 C. L. R. 27 ; Ram Narain v. Mahabir Pershad 13 Cal. 208 ; Deonandan v. Manbodh 32 Cal. 111 ; 8 C. W. N. 757 ; Dilchaud v. Baijnath 8 C. W. N. 337.

51. Tasadduk Rasul v. Ahmad Husain 20 I. A. 176 ; 21 Cal. 66 ; Gobind Lal v. Ram Janam 20 I. A. 165 ; 21 Cal. 70 ; Deonandan v. Manbodh 32 Cal. 111 ; 8 C. W. N. 757 ; Baij Nath v. Ravaneshwar 6 C. L. J. 163 ; Gang Prosad v. Pargash Singh 16 C. L. J.

52. Dilchand v. Baijnath 8 C. W. N. 337 ; Deonandan v. Manbodh 32 Cal. 111 ; 8 C. W. N. 757 ; Ismail Khan v. Abdul Aziz 32 Cal. 502 ; 9 C. W. N. 343 ; 1 C. L. J. 14 ; Ram Narain v. Mahabir

53. Bal Mokoond v. Jirjudhun 9 Cal. 271 ; 11 C. L. R. 466.

54. Tasadduk Rasul v. Ahmad Husain 20 I. A. 176 ; 21 Cal. 66 ; Gobind Lal v. Ram Janam 20 I. A. 165 ; 21 Cal. 70 ; Deonandan v. Manbodh 32 Cal. 111 ; 8 C. W. N. 757 ; Baij Nath v. Ravaneshwar 6 C. L. J. 163 ; Gang Prosad v. Pargash Singh 16 C. L. J.

LECTURE IX. The Collector shall also affix a proclamation in the language of the district in his own office and in the Munsiff's Courts, Subdivisional Cutchery and Police Thanas within which the property or any part of it is situate and also at the cutchery of the malgnzar, or the owner, or at some conspicuous place on the property, forbidding the tenants to pay to the defaulter any rent which has fallen due after the date fixed for the last day of payment on pain of not being entitled to credit in their account with the purchaser for any sums so paid.⁵⁶ The object of this notification is to protect the tenants and the purchaser ; and as the omission to issue this notice does not cause any possible loss to the defaulter, it does not affect the legality of the sale.⁵⁷

Sale of separate share.

When a separate account has been opened under Ss. 10 and 11 of Act XI of 1859 for one or more shares, if the *whole* estate has become liable to sale for arrears of revenue, the Collector shall in the first instance put up to sale only the *share* or *shares* from which, according to the separate account, an arrear may be due.⁵⁸ The Collector is entitled to sell a revenue unit in its entirety, whether it be an estate or a share. He is not entitled to dismember that revenue unit for the purpose of realisation of arrears.⁵⁹ A mere application by a cosharer for opening a separate account will not prevent the Collector from selling the entire estate.⁶⁰ If the highest offer for the share exposed to sale shall not equal the amount of arrear due thereupon to the date of sale, the Collector shall stop the sale and declare that the *entire* estate will be put up to sale at a future time, unless the other recorded sharer or sharers shall within 10 days purchase the share in arrear by paying the whole arrear due from such share. If no such purchase is made the entire estate shall be sold after due notification.⁶¹ The declaration

524 : Mobaruk v. Sec. of State 11 Cal. 200 (F. B.) ; Mohabeer Pershad v. Coll. of Tirhoot 15 W. R. 137.

56. S. 7 B. L. R. S. Act XI of 1859 ; S. 7 Act VII (B.C.) of 1868.

57. Bhawani Koer v. Afzal Husain 34 Cal. 381 ; 5 C. L. J. 425 ; Gobin Chunder v. Sherajunissa 13 C. L. R. 1 ; Mahomed Azhar v. Raj Chunder 21 Cal. 354 ; Azimuddin v. Sec. of State 21 Cal. 360 ; Muhammad Aga v. Jadunandan Jha 10 C. W. N. 137 ; 2 C. L. J. 325 ;

Sheorutton v. Net Loll 30 Cal. 1 ; 6 C. W. N. 658.

58. S. 13 B. L. R. S. Act XI of 1859 ; Indra Mani v. Priya Nath 18 C. W. N. 490 ; 18 C. L. J. 505.

59. Ganga Prosad v. Pargash Singh 16 C. L. J. 524.

60. Rajendro v. Doorga 7 W. R. 154.

61. S. 14 B. L. R. S. Act XI of 1859.

should be made but it need not be notified.⁶² The ten days run from the time when notice of the order is given to the other cosharers.⁶³ Where more than one sharer deposited the arrears separately and the Collector issued a certificate jointly to them, the different sharers would be entitled to equal shares in the property under S. 45 T. P. Act IV of 1882, irrespective of their shares in the parent estate.⁶⁴

Sales shall ordinarily be held in the Land Revenue Office at the Sadar Station of the district, unless the Board of Revenue prescribes another place, beneficial to the parties concerned.⁶⁵ The sale shall be held on the day fixed, but if the Collector or other officer is unable from sickness or other cause to commence or complete the sale on that day, he shall adjourn the sale to the next day, not being Sunday or other close holiday, recording his reason for such adjournment, forwarding a copy of such record to the Commissioner of Revenue and announcing the adjournment by written proclamation stuck up in his entchery.⁶⁶ But where the original notification is bad, in as much as the day specified therein for the sale is not 30 days from the date of notification, the defect cannot be cured by an adjournment.⁶⁷

Adjournment
of sale.

Any person guilty of contempt committed in the presence of the Collector, may be fined to the extent of Rs. 200 commutable, if not paid, to imprisonment in the civil jail for a period not exceeding one month.⁶⁸

On the day of sale, the sale shall proceed in regular order, that is, the estate bearing the lowest number on the Collector's register shall be put up first and so on in regular sequence.⁶⁹ It is of utmost importance that sale under the Act, the provisions of which in the interests of the State have a character of unusual stringency, should be conducted with all possible fairness and impartiality.⁷⁰

The purchaser shall immediately after the sale deposit 25 p. c. of the amount of the bid, and on his failure to do so the lot shall

62. Bhawani Koer v. Afzal Husain 34 Cal. 381; 5 C. L. J. 425.

63. Chutturbhooj v. Ishri Mal 21 Cal. 844.

64. Debi Pershad v. Aklio Koer 4 C. W. N. 465.

65. S. 10 B. L. R. S. Act XI of 1859.

66. S. 20 B. L. R. S. Act XI of 1859.

67. Bal Mokoond v. Jirjudhun 9 Cal. 271; 11 C. L. R. 466.

68. S. 56 B. L. R. S. Act XI of 1859.

69. S. 21 B. L. R. S. Act XI of 1859.

70. Halimamissa v. Sec. of State 31 Cal. 1036; 8 C. W. N. 880.

LECTURE IX. forthwith be put up and sold.⁷¹ A default to make good a bid by making the deposit is a contempt.⁷² If there be no bid, the Collector may purchase the estate on account of the Government for one rupee, or if the highest bid be insufficient to cover the arrears and those subsequently accruing up to the date of sale, the Collector may purchase the estate on account of the Government at the highest amount bid.⁷³ But it is not open to the Collector to compete with the other bidders.⁷⁴

The full amount of the purchase-money shall be paid before sunset of the 30th day from the day of sale and in default, the deposit of 25 p. c. shall be forfeited to the Government and the lot shall be resold, and if the proceeds of sale be less than the previous bid, the difference shall be leviable from the defaulting bidder by any process authorised for realising an arrear of public revenue, and such difference shall be considered to be a part of the purchase-money.⁷⁵ The Collector need not realise the difference *suo motu* but upon an application by the defaulting proprietor, it may be realised as an arrear of revenue.

Before the resale a notification of the intended sale shall be published, unless before sunset of the third day after the default, payment or tender of payment is made of the arrear on account of which the estate or share was first sold and of any arrear that may have subsequently become due.⁷⁶

Annulment of
sale. The Commissioner of Revenue may, on appeal, annul any sale which appears to him to have been conducted not according to the provisions of the law, and if the sale were occasioned by the neglect of the proprietor, may award to the purchaser for his loss a payment from the proprietor of compensation not exceeding the interest at the highest rate of the Government Securities on the amount of deposit or balance of purchase-money from the date of its deposit on the Collector's office.⁷⁷ The order of the Commissioner is final and not open to review,⁷⁸ but it does not bar a civil suit for setting aside a sale

71. S. 22 B. L. R. S. Act XI of 1859.

1859.

77. S. 2 B. L. R. S. Act VII (B. C.) of 1868.

72. S. 51 B. L. R. S. Act XI of 1859.

78. Baijnath v. Nanda Kumar 40

73. S. 38 B. L. R. S. Act XI of

I. A. 51 ; 40 Cal. 552 ; 17 C. W. N.

1859.

485 ; 17 C. L. J. 583, on appeal from 34

Cal. 677 ; 11 C. W. N. 803 ; 6 C. L. J.

81.

74. S. 23 B. L. R. S. Act XI of 1859.

75. S. 24 B. L. R. S. Act XI of

on the ground that the sale was vitiated by a material irregularity, leading to substantial injury.⁷⁹ A suit by a purchaser for recovery of compensation awarded by the Commissioner is maitainable in a civil Court.⁸⁰

The Commissioner may also on the ground of hardship or injustice suspend the passing of final orders and represent the case to the Board of Revenue who may recommend to the Local Government to annul the sale and the Local Government may annul the sale on such conditions as may appear equitable and proper.⁸¹

When a sale is annulled it shall be publicly notified by the Collector and the amount of deposit shall be forthwith returned to the purchaser with interest thereon at the highest rate of Government Securities.⁸²

All sales of which purchase-money has been paid up within the prescribed time and against which no appeal has been preferred, shall be final and conclusive at noon of the 60th day from the day of sale. Sales against which an appeal may have been preferred and dismissed by the Commissioner, shall be final and conclusive from the date of such dismissal, if more than sixty days from the day of sale, or if less, then at noon on the 60th day from the day of sale.⁸³

Confirmation
of sale.

Upon a sale becoming final and conclusive, the purchaser shall get a certificate which shall be deemed to be sufficient evidence of title of the estate or share of an estate sold being vested in the person named therein from the date specified. The Collector shall notify such transfer by written proclamation in his own office and in the Court of Munsiffs and Police Thanas, within whose jurisdiction any part of the estate or share sold shall be situated.⁸⁴ But the certificate of sale does not create title ; it is merely evidence of title which can be proved independently of it.⁸⁵

Certificate of
sale.

The certificate shall be conclusive evidence that all notices required to be served and posted have been duly served and posted and the title of the purchaser shall not be impeached or affected

79. Ram Taruck v. Dilwar Ali 29 Cal. 73 ; 5 C. W. N. 521.

159. 83. S. 27 B. L. R. S. Act XI of

80. Chuttu Lal v. Bhagwati Prosad 1 C. W. N. 447.

1859. 84. S. 28 B. L. R. S. Act XI of

81. S. 26 B. L. R. S. Act XI of 1859.

1859. 85. Khobhari Singh v. Ram Prosad 7 C. L. J. 387.

82. S. 32 B. L. R. S. Act XI of

LECTURE IX. by reason of any omission, informality or irregularity as regards the serving or posting of any notice.⁸⁶ A certificate issued before the 60th day is not a certificate which cures defects in the service of notice, or in the proclamation of sale.⁸⁷ When the purchaser has got a certificate of sale, no objection as to service of notice can be raised.⁸⁸ But this does not prevent the Court from ascertaining for other purposes whether the notice was so served as to fix on the party served with the knowledge of it.⁸⁹ But the certificate does not cure any defect in the notice itself *e. g.*, where the notice was not served thirty days before the date fixed for sale,⁹⁰ or when no order was passed for service of notice under S. 5 Act XI of 1859,⁹¹ or where it was served in a wrong place.⁹²

Suit against
certified pur-
chaser barred

Any suit brought to oust the certified purchaser, on the ground that the purchase was made on behalf of another person, shall be dismissed with costs.⁹³ It is a penal provision and ought to be construed strictly and literally so as not to extend its operation to cases not covered by the terms, nor presumably intended by the Legislature to fall within its scope.⁹⁴ Thus, a person who claims through the certified purchaser is not protected.⁹⁵ So, a suit against the certified purchaser for specific performance of an agreement, made before the purchase to convey the property purchased, is maintainable.⁹⁶

86. S. 8. B. L. R. S. Act VIII (B. C.) of 1868; *Bishambhar v. Bonomali* 26 Cal. 414; 3 C. W. N. 233 (F. B.)

87. *Monindra v. Saraswati* 18 Cal. 125.

88. *Bhawani Koer v. Afzal Husain* 34 Cal. 381; 5 C. L. J. 425; *Bageswari v. Gowhar* 31 I. A. 52; 31 Cal. 256;

8 C. W. N. 619; *Sheorutton v. Net Loll* 30 Cal. 1; 6 C. W. N. 688.

89. *Janki Singh v. Debinandan* 15 C. W. N. 776.

90. *Bal Mokoond v. Jirjudhun* 9 Cal. 271; 11 C. L. R. 466; *Mobarnk v. Sec. of State* 11 Cal. 200; *Jahnovi v. Sec. of State* 7 C. W. N. 377; *Sheorutton v. Net Loll* 30 Cal. 1; 6 C. W. N. 688; *Uzirali v. Kartick Chunder* 2 C. W. N. 363; *Bageswari v. Gowhar* 31 I. A. 52; 31 Cal. 256; 8 C. W. N.

649; *Muhammad Aga v. Jadunandan Jha* 10 C. W. N. 137; 2 C. L. J. 325.

91. *Gonesh Pershad v. Brij Behary* 1 C. L. J. 565.

92. *Rajrani v. Ganesh Proshad* 14 C. W. N. 626.

93. S. 36 B. L. R. S. Act XI of 1859, S. 21 Act I of 1845.

94. *Monmota Nath v. Girish Chandra* 17 C. W. N. 75.

95. *Raj Chunder v. Dina Nath* 2 C. W. N. 433; *Buhuns v. Buhooree* 14 Moo. 496; 18 W. R. 157; 10 B. L. R. 159; *Lokhee Narain v. Kali-puddo* 2 I. A. 154; 23 W. R. 358; *Tundan v. Pokh Narayan* 1 I. A. 342; cf. O. 21, r. 66 C. P. C. Act V of 1908.

96. *Monmota Nath v. Girish Chandra* 17 C. W. N. 75.

The statute merely prevents the true owner from disputing the title of the benamdar but does not preclude a third party from enforcing a claim against the true owner.⁹⁷ Thus, where a purchase was made by the managing member of a joint Hindu family in his own name, but on behalf of the joint family, the members of the family may sue to enforce their right against the managing member, though he is the sole certified purchaser.⁹⁸ So, where the true owner is in actual possession, a suit for a declaration of his right, not being a suit to oust the certified purchaser, is not barred.⁹⁹ Where the certified purchaser induced another to purchase from the true owner, alleging that he was a mere trustee, the rule has no application.¹⁰⁰

The Collector shall then deliver possession of the estate or share to the purchaser by removing any person who may refuse to vacate the same and by proclamation to the occupants of the property and by affixing a copy of the certificate at the Mal Cutchery or in some conspicuous place of the estate or share of an estate purchased.¹⁰¹ The purchaser is entitled to sue for actual possession of the land within 12 years from the date of purchase.¹⁰²

Delivery of possession.

The estate vests in the purchaser from the date of default. But the power of the defaulter to deal with his property is not lost by reason of the default; the ownership of the property continues in the defaulter till the sale takes place.¹⁰³ Any incumbrance or alienation created between the date of default and the date of sale, is not inoperative against the defaulter but it does not affect the purchaser.¹⁰⁴ Arrears of rent due to the defaulter on the latest day of payment of revenue from his under-tenants or raiyats can, in the event of sale, be recoverable after the said latest day by any process except distraint.¹⁰⁵

97. Chundra Kaminy v. Ram Ruttun 12 Cal. 302.

98. Tundan v. Pokh Narayan 13 W. R. 347; 5 B. L. R. 546; aff. I. I. A. 342.

99. Fazal Rahaman v. Imam Ali 14 Cal. 583; Johur Ali v. Brindabun 14 W. R. 10.

100. Jadub Ram v. Ram Lochum 5 W. R. 56.

101. S. 20 B. L. R. S. Act XI of 1859.

102. Narain v. Tayler 4 Cal. 103;

3 C. L. R. 151; Mozuffer v. Abdus Samad 6 C. L. R. 539.

103. Khobhari Singh v. Ram Prosad 7 C. L. J. 387; Shyam Kunari v. Rameswar 31 I. A. 176; 32 Cal. 27; 8 C. W. N. 786; Hari Charan v. Haridas 2 C. L. J. 506; Umatara v. Uma Charan 3 C. L. J. 52.

104. Umatara v. Uma Charan 3 C. L. J. 52; Jogessar v. Khetter Mohun 17 Cal. 148; Bhowani Koer v. Mathura Prasad 7 C. L. J. 1.

105. S. 55 B. L. R. S. Act XI of 1859.

LECTURE IX.

The purchaser is answerable for all instalments of the revenue which may fall due after the latest day of payment.¹⁰⁶ The Government revenue does not become due from day to day but at certain specified times according to the contract of the parties or the custom of the district in which the lands liable to pay such revenue are situate. It is not, therefore, liable to apportionment and the person who is the owner of a revenue-paying estate or tenure at a time when payment of revenue falls due, is the only person liable for its payment. The purchaser of an estate, therefore, takes it subject to all revenue and censes, whether in arrear or accruing.¹⁰⁷

Suit to set aside a revenue-sale

(i) Irregularity.

No sale shall be annulled by a Court of justice except upon ground of its having been made contrary to the provision of Act XI of 1859, read with Act VII (B. C.) of 1868 and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of, provided that (1) such grounds shall have been declared and specified in an appeal made to the Commissioner (2) the suit shall be instituted within one year from the date of the sale becoming final and conclusive and (3) the plaintiff has not received any portion of the purchase-money. But this does not debar any person from his remedy in a personal action against the person by whose act or omission he has been damaged by the sale.¹⁰⁸ The plaintiff is entitled to proceed simultaneously in the Civil Court and the Revenue Court.¹⁰⁹

The right to set aside a sale is not confined to proprietors alone but extends to all persons having an interest in the property antecedent to sale, e.g., a mortgagee,¹¹⁰ or a putnidar.¹¹¹ The Secretary of State for India is not a necessary party to such a suit.¹¹² A suit to set aside a sale is not a suit for a declaratory decree where no consequential relief is asked for and therefore advalorem

106. S. 30 B. L. R. S. Act XI of 1859.

107. Chatrapat v. Girindra 6 Cal. 389; 7 C. L. R. 456; Shyam Kumari v. Rameswar Singh 31 I. A. 176; 32 Cal. 27; 8 C. W. N. 786.

108. S. 33 B. L. R. S. Act XI of 1859.

109. Gunessur v. Gonesh 25 Cal. 789; affi. 33 I. A. 134; 33 Cal. 1173; 10 C. W. N. 969; 4 C. L. J. 177.

110. Watson v. Sreemunt 5 Moo.

447; Gobind Lal v. Biprodas 17 Cal. 398, atff. Gobind Lal v. Ramjanam 20 I. A. 165; 21 Cal. 70.

111. Jahnnovi v. Sec. of State 7 C. W. N. 377; Gobind Lal v. Biprodas 17 Cal. 398.

112. Bal Mokoond v. Jirjudhun 9 Cal. 271; 11 C. L. R. 466; Balkishen v. Simpson 25 I. A. 151; 25 Cal. 833; 2 C. W. N. 513; Jahnnovi v. Sec. of State 7 C. W. N. 377.

Court fee should be paid.¹¹³ The onus is upon the person who seeks to have the sale set aside to establish that the requirements of the statute have not been complied with.¹¹⁴

A sale cannot be set aside on the ground of mere irregularity, unless such irregularity is shown to have caused loss or damage to the defaulter.¹¹⁵ The question whether the inadequacy of the price is the result of irregularity, is a question of fact and may be either established by direct evidence, or inferred where such inadequacy is reasonable from the nature of the irregularity and the extent of the inadequacy of the price, but no hard and fast rule can be laid down as to the amount or nature of the evidence required to prove the connection between the irregularity and inadequacy of the price.¹¹⁶ But in the absence of any evidence, the injury shewn cannot be presumed to be by reason of the irregularity proved.¹¹⁷ Thus, the Court cannot properly find without evidence that mere misstatement of revenue in the proclamation of sale caused an injury to the defaulter by causing an inadequate price paid at the sale.¹¹⁸

A person under legal disability instituting the suit, does not get an extension of time under S. 6 of the Limitation Act IX of 1908, though S. 33 provides the same period as Art. 12 Sch. I of the Limitation Act IX of 1908 *viz.*, one year from the date when the sale is confirmed or would otherwise have become final and conclusive.¹¹⁹

The Civil Court is not competent to entertain a suit for setting aside a sale on the ground of irregularity, unless an appeal to the

(a) Substantial injury must be proved.

(b) Suit must be brought within one year.

(c) Appeal to the Commissioner essential.

113. Mahomed Takibuddin v. Coll. of 24 Parganahs 6 C. W. N. 157; Gopal Chunder v. Mohesh Chunder 9 Cal. 239; 13 C. L. R. 146.

114. Muhammad Aga v. Jadunandan Jha 10 C. W. N. 137; 2 C. L. J. 325; Sheorutton v. Net Loll 30 Cal. 1; 6 C. W. N. 688.

115. Luleeta v. Coll. of Tirhoot 19 W. R. 283.

116. Ismail Khan v. Abdul Aziz 32 Cal. 502; 9 C. W. N. 343; 1 C. L. J. 14; Gur Buksh v. Jawahir 20 Cal. 599; Surno Moyee v. Dakhina Ranjan 24 Cal. 291; Saadatamand v. Phul Kuar 25 I. A. 146; 20 All. 412; 2 C. W. N. 550; Jamiini Mohun v. Chandra

Kumar 6 C. W. N. 44; Bhikari Misra v. Surja Moni 6 C. W. N. 48; Hem Chandra v. Sarat Kamini 6 C. W. N. 526; Sheorutton v. Net Loll 30 Cal. 1; 6 C. W. N. 681; Nibaran v. Chiranjib 32 Cal. 542; 9 C. W. N. 487; Gangadhar v. Bhikari Charan 16 C. W. N. 227.

117. Tripura Sundari v. Durga Churn 11 Cal. 74; Mobaruk v. Sec. of State 11 Cal. 200; Satish Chundra v. Thomas 11 Cal. 658.

118. Macnaghten v. Mahabir Pershad 10 I. A. 25; 9 Cal. 656; 11 C. L. R. 494.

119. Panchkouri v. Pran Gopal 13 C. W. N. 518; Bajj Nath v. Ravaneswar 6 C. L. J. 163.

LECTURE IX. Commissioner has been made.¹²⁰ An appeal preferred after the time limited has expired is not such an appeal.¹²¹ In every case when a sale for arrears of revenue is impeached as being irregularly conducted, as where it is illegal in consequence of an express provision having been contravened, no grounds of objection are open to the plaintiff which have not been declared and specified on appeal to the Commissioner,¹²² for anything which impairs the security of purchasers tends to lower the price of the estate put up for sale and the purchaser should not be exposed to the danger of having the sale set aside after a year upon new grounds.¹²³

Ordinarily, a suit is not maintainable to set aside a revenue sale on the ground of fraud. But the wilful default by a purchaser of a widow's interest in bringing about the sale so as to defeat reversioners' right is a ground for setting aside the sale on such ground.¹²⁴ A decree setting aside the sale of an entire joint estate cannot be affirmed as to the unascertained share of some joint shareholders and reversed as to the unascertained shares of others.¹²⁵

ii. Illegality. A sale for arrears of revenue is a sale under B. L. R. S. Act XI of 1859 and Act VII (B. C.) of 1868, "although it may be contrary to the provisions of the Acts, either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provisions for exemption having been directly contravened."¹²⁶ But Act XI of 1859 and Act VII (B.C.) do not sanction and by implication forbid the sale of any estate or tenure which is not at

120. Mohun Lall v. Coll. of Tirhoot 1 W. R. 356.

Cal. 256; 8 C. W. N. 649; Bhooban

Chunder v. Ram Soonder 3 Cal. 300; Mir Waziruddin v. Deoki Nandan 6 C. L. J. 472; Gunessar v. Gonesh 25 Cal. 786, aff. 33 I. A. 134; 33 Cal. 1178; 10 C. W. N. 969; 4 C. L. J. 177.

Amirunnessa v. Sec. of State 10 Cal. 63; 13 C. L. R. 131; Gunga Narain v. Cornell 10 W. R. 442.

121. Gauri Shankar v. Janki Pershad 17 I. A. 57; 17 Cal. 809; Gobind Lal v. Ranjanam; 20 I. A. 165; 20 Cal. 70; Gobind Chundra v. Sherajunnissa 13 C. L. R. 1; Muhammad Aga v. Jadunandan Jha 10 C. W. N. 137; 2 C. L. J. 325; Chutturbhooj v. Ishri Mul 21 Cal. 844; Jahnuvi v. Sec. of State 7 C. W. N. 377; Deonandan v. Manbodh 32 Cal. 111; 8 C. W. N. 757; Bageswari v. Gowhar 31 I. A. 52; 31

123. Gobind Lal v. Ramjanam 20 I. A. 165; 21 Cal. 70; Hari Das v. Dhiraj Chandra 15 C. W. N. 38.

124. Chunder Nath v. Tirthanund 3 Cal. 504; 2 C. L. R. 147.

125. Dharamjit v. Chandreshwar 11 C. W. N. 504; 5 C. L. J. 393.

126. Tasadduk Rasul v. Almas Husain 20 I. A. 176; 21 Cal. 66; Gangadhar v. Bhikari Charan 16 C. W. N. 227; Gobind Lal v. Ramjanam 21 I. A. 165; 21 Cal. 70.

the time in arrear of revenue and are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty.¹²⁷ A suit to set aside a sale, therefore, on the ground that no arrear was due, may be brought in the Civil Court even if such ground has not been specified in an appeal, or even without a previous appeal, to the Commissioner.¹²⁸

When a sale is set aside by a decree of a Civil Court an order for restoring the decree-holder to possession shall not be passed, unless the application for execution of the decree is made within six months after the date thereof, and unless any amount of surplus purchase-money that may have been paid away by order of a Civil Court, be repaid by him with interest at the highest rate of the current Government Securities within the said period of six months.¹²⁹ The order for refund of purchase-money must be made in execution of the decree.¹³⁰ When one of the purchasers is saddled with costs on the sale being set aside, he can maintain a suit for contribution against the other purchasers.¹³¹ When a sale is annulled and the former proprietor restored to possession, the purchase-money shall also be refunded to the purchaser by Government with interest at the highest rate of current public securities.¹³²

"The statutory title however which the law gives to the auction purchaser is that for the protection of the revenue, and in order to ensure its due payment by him and to avoid the necessity of repeated sales of the property, he is remitted to all those rights which the original settler at the date of the perpetual settlement had, and may in consequence of that sweep away or get rid of all intermediate tenures and incumbrances created by preceding Zemindar since that date."¹³³ The purchaser does not derive his title from the defaulting proprietor. He claims under a permanent title and adversely to him

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Effect of setting aside a sale.

Refund of purchase-money.

Rights of the purchaser.

127. Balkishen v. Simpson 25 I. A. 151; 25 Cal. 833; 2 C. W. N. 513; Buksh Elahi v. Durlav Chandra 39 I. A. 177; 39 Cal. 981; 16 C. W. N. 842; 16 C. L. J. 620.

128. Baijnath v. Sital Prasad 10 W. R. (F. B.) 66; 2 B. L. R. (F. B.) 1; Harkoo Singh v. Bunisidhur 25 Cal. 876; 2 C. W. N. 360; Balkishen v. Simpson 25 I. A. 151; 25 Cal. 833; 2 C. W. N. 513; Mangina Khatun v. Coll. of Jessore 3 B. L. R. App. 141; 12 W. R. 311; Thakoor Churn v. Coll.

of 24 Pergs. 13 W. R. 336.

129. S. 34 B. L. R. S. Act XI of 1859.

130. Sreemunt v. Shama Soonduree 12 W. R. 276.

131. Rambeyas v. Sheoji Singh 5 C. L. J. 64.

132. S. 35 B. L. R. S. Act XI of 1859.

133. Per Sir J. Colville, in Forbes v. Mahomed Hossein 20 W. R. 11 P. C. at p. 16; 12 B. L. R. 210.

LECTURE IX. He is not privy in estate to him, nor is he bound by his acts and laches, nor is any judgment binding on him.¹³⁴ He is entitled to be made a party in a pending Land Acquisition Proceeding ; but he can urge only such objections as might have been taken by the defaulter ; his special rights, if any, as a revenue-sale purchaser must form the subject of a separate suit.¹³⁵ A sale for arrears of revenue is not an alienation by the proprietor so as to make the doctrine of *lis pendens* applicable.¹³⁶ But the purchaser does not acquire any peculiar right different from that of any other proprietor.¹³⁷

i. Entire estate.

The purchaser of an entire estate or tenure sold for arrears of revenue shall acquire the estate free from all encumbrances, imposed upon it after the time of settlement.¹³⁸ The word "estate" means any land or share in a land, subject to the payment to Government of an annual sum in respect of which the name of a proprietor is entered in the register, known as the register of all revenue paying estate, or in respect of which a separate account may have been opened ; and the word "tenure" includes all interests other than estates.¹³⁹

When an estate is recorded in a separate number with a separate revenue assessed upon it, and the certificate of sale shows that the estate sold was an entire estate, the mere fact that a portion of the land of that estate being joint with that of another estate, cannot stand in the way of its being an entire estate.¹⁴⁰ A partition by the Collector merely apportions the amount of revenue without any settlement of the revenue.¹⁴¹ The fact that several proprietors paid their revenues through one of the members cannot override their

134. Buzlool Rahman v. Prandhun 8 W. R. 222; Watson & Co. v. Nobin Mohun 10 W. R. 72; Gadadhar v. Radha Charan 31 Cal. 868; Radha Gobind v. Rakhal Das 12 Cal. 82; Bilas Chandra v. Akshya Kumar 16 C. W. N. 587; 15 C. L. J. 436; Kanta Proshad v. Abdul Jamir 8 C. W. N. 676.

135. Promotha Nath v. Rakhal Das 11 C. L. J. 420.

136. Mahadeo Saran v. Thakur Prosad 14 C. W. N. 677; 11 C. L. J. 528.

137. Bundi Roy v. Bunsee 21 W. R.

64.

138. S. 37 B. L. R. S. Act XI of 1859; S. 12 Act VII (B. C.) of 1868; Kali Dass v. Chandra Mohini 8 W.R. 68; Madhub Chunder v. Promothonath 20 W. R. 261.

139. S. 1 Act VII (B. C.) of 1868.

140. Kamal Kumari v. Kiran Chandra 2 C. W. N. 229; Preonath v. Kiran Chandra 27 Cal. 290.

141. Koowar Singh v. Gourchunder 24 Cal. 887; Monohur v. Huromohun 1 W. R. 27.

legal right of separate proprietorship.¹⁴² Under S. 34 Reg. XI of 1822 the Governor-General in Council can, on a proper representation being made within 10 years after the separation of an estate, order a new allotment of the jama. But where the estate actually continued in the Collector's roll as an entire estate paying separate revenue it is an entire estate.¹⁴³

The purchaser is entitled to all lands at the time of settlement *i.e.*, when the contract was made and not necessarily the Permanent Settlement of 1793.¹⁴⁴ The onus of proof is upon the person who affirms that any particular land was included in the settlement and is not necessarily shifted by the production of Thak and Survey maps.¹⁴⁵ The purchaser is also entitled to all lands which subsequently accreted thereto by alluvion.¹⁴⁶ But a purchaser of the parent estate acquires no title in the resumed Chowkidari land which is held under a different title from the other malguzari lands.¹⁴⁷ A district such as the Sunderbuns of which only a portion is permanently settled, is a permanently settled district, whether the estate sold be settled permanently or temporarily.¹⁴⁸

Embankments are not encumbrances or liable to be extinguished.¹⁴⁹ A sale in execution of a mortgage decree not confirmed when the arrear falls due, is not an encumbrance.¹⁵⁰ The purchaser shall be entitled to avoid all under-tenures and eject all under-tenants with the exceptions of (1) Istmrari or mukarrari tenures held at a fixed rent from the time of the Permanent Settlement (2) tenures existing at the time of settlement not held at a fixed rent, although the rent shall be liable to enhancement under the law for the time being in force (3) talukdari and other similar tenures and farms which have been duly registered under Ss. 38 to 42

Encum-
brances.

142. Ram Golind v. Kushuffudoza 15 W. R 141.

143. Rai Mohan v. Sashanka Mohan 12 C. L. J. 407.

144. Tamasha Bibi v. Ashutosh 4 C. W. N. 513; Raj Chunder v. Busheer Mahomed 25 W. R. 476; Koowar Singh v. Gourchunder 24 Cal. 887; Nagendra Lal v. Nazir Ali 10 C. W. N. 503.

145. Ananda Hari v. Sec. of State 3 C. L. J. 316; Mohesh Chunder v. Juggut Chunder 5 Cal. 212; Syam Sunderi v. Jug o' undhu 16 Cal. 186.

146. Kanta Proshad v. Abdul Jamir 8 C. W. N. 676.

147. Kashim Sheik v. Prosunno Kumar 33 Cal. 596; 10 C. W. N. 598.

148. Bholanath v. Uma Churn 11 Cal. 440.

149. Coll. of 24 Pergs. v. Joynarain W. R. (F. B.) 17.

150. Prem Chand v. Purnima 15 Cal. 546; Bhawani Kuwar v. Mathura Prosad 39 I. A. 228; 40 Cal. 89; 16 C. W. N. 985; 16 C. L. J. 606 reversing 7 C. L. J. 1.

LECTURE IX. B. L. R. S. Act XI of 1859 and (4) leases of lands whereon dwelling houses, manufactories or other permanent buildings have been erected or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk, though the rent can be enhanced in the manner prescribed by any law for the time being in force for the enhancement of rent, if it be proved that it has been held at what was originally an unfair rent and that it has not been held at a fixed rent equal to the rent of good arable land.¹⁵¹ The period of limitation to a suit to avoid an incumbrance is, under Art. 121 Sch. I Limitation Act IX of 1908, 12 years from the time when the sale becomes final and conclusive.¹⁵²

The right to avoid an incumbrance must be exercised by all the purchasers jointly.¹⁵³ Different suits against different cosharers of under-tenures are maintainable.¹⁵⁴ The rights conferred upon the purchaser are capable of being transferred to another person.¹⁵⁵ Thus, when the purchaser has created a putni the right passes to the putnidar.¹⁵⁶

To "avoid" is to do something in exercise of the right of avoidance¹⁵⁷ Hence, an incumbrance is not *ipso facto* avoided by the sale but is avoidable at the option of the purchaser.¹⁵⁸ Such

151. S. 37 B. L. R. S. Act XI of 1859.

152. Harek Chand v. Bejoy Chand 9 C. W. N. 795; 2 C. L. J. 87; Broj Soondur v. Futick Chunder 17 W. R. 407; Sibdyal v. Gouree 18 W. R. 281; Narain v. Tayler 4 Cal. 103; 3 C. L. R. 151.

153. Dwarkanath v. Grish Chunder 6 Cal. 827; Jatra Mohun v. Aukhil Chandra 24 Cal. 334; 1 C. W. N. 314.

154. Subhadra v. Chandra Kumar 8 C. W. N. 54.

155. Meizuddi v. Ishan Chandra 15 C. W. N. 703; 13 C. L. J. 293; Koylash Chunder v. Jubur Ali 22 W. R. 29; Sooharam v. Doorga Charan 5 C. L. J. 261; Forbes v. Mahomed Hossein 20 W. R. 44 P. C.; 12 B. L. R. 210; Surnomoyee v. Suttoshchunder 8 Moo. 164; 2 W. R. 14 P. C.; Tara Chand v. Wakenoissa 7 W. R. 91; Sattyasaran

v. Mohesh Chandra 12 Moo. 263; 2 B. L. R. P. C. 23; 11 W. R. 10 P. C.; Narayan v. Kasiswar 1 C. L. J. 579; Soshi v. Kramatullah 10 C. W. N. 148; Ananda v. Kunjo 8 C. L. J. 177.

156. Sreemunt v. Kookoor Chander 15 W. R. 481; Koylash Chunder v. Jubur Ali 22 W. R. 29; Narayan v. Kasiswar 1 C. L. J. 579; Wahid Ali v. Rahit Ali 12 C. W. N. 1029.

157. Per Jackson J., in Unnoda v. Mothura 4 Cal. 860 at p. 861; 4 C. L. R. 6.

158. Ramratan v. Aswini Kumar 37 Cal. 559; 14 C. W. N. 819; 11 C. L. J. 503; Dursan Singh v. Bhawani Koer 17 C. W. N. 984; Surnomoyee v. Suttoshchunder 8 Moo. 164; 2 W. R. 11 P. C.; Assanoollah v. Obhoy Churn 13 Moo. 317; 13 W. R. 24 P. C.; Mir Waziruddin v. Deoki Nandan 6 C. L. J. 172; Titu Bibi v. Mohesh Chunder 9 Cal. 683; 12 C. L. R. 301

option may be exercised by the institution of a suit within the time allowed by law without any notice or by giving notice to quit or by any other manner.¹⁵⁹ Where no notice is given the under-tenure should be deemed to have been annulled on the date of institution of the suit.¹⁶⁰ Mere receipt of rent by the purchaser does not necessarily prevent him from avoiding an incumbrance.¹⁶¹ The fact that the Collector purchased the estate does not make any difference.¹⁶² Where the Government as auction-purchaser waived all rights to avoid the under-tenures, a purchaser from the Government could not put in force any rights which his vendor had waived.¹⁶³ The tenure sought to be avoided must be avoided in *toto* and as to all the lands belonging to it; hence, the transferee only of all those lands of the tenure which are included in the mehal can avoid the tenure.¹⁶⁴ A decree for partial ejection and joint possession can be made in favour of co-owners of property.¹⁶⁵

Where an undertenure is avoided the purchaser is entitled to receive as mesne profits sums payable as rent by tenure-holder of the first degree.¹⁶⁶ But the purchaser is not entitled to mesne profits for the period antecedent to the exercise by him of his option of annulment, for mere delivery of possession to the purchaser does not make the undertenure-holder a trespasser.¹⁶⁷

When a portion of a taluk existing from before the time of the Permanent Settlement is held at a proportionate rent and can be traced from the original taluk, it is protected.¹⁶⁸ An entry in the Special Register is an effectual protection.¹⁶⁹ But where a mortgage

F. B. ; Mafizuddin v. Korbad Ali 31
Cal. 393 ; 8 C. W. N. 115.

159. Ramratan v. Aswini Kumar
37 Cal. 559 ; 14 C. W. N. 849 ; 11 C. L. J. 503 ; Kamal Kumari v. Kiran Chandra
2 C. W. N. 229 ; Dursan Singh v. Bhawani Koer 17 C. W. N. 981.

160. Ramratan v. Aswini Kumar
37 Cal. 559 ; 14 C. W. N. 849 ; 11
C. L. J. 503.

161. Tara Chand v. Wakenoonissa 7
W. R. 91.

162. S. 58 B. L. R. S. Act XI of 1859.

163. Sattyasaran v. Mohesh Chandra
12 Moo. 263 ; 2 B. L. R. P. C. 23 ; 11 W. R. 10 P. C. ; Shook Deb v. Alladi 2 C. L. R. 13 ; Aftabodddeen v. Sanioollah 23 W. R. 245 ; Trilochun v. Komola Kant

25 W. R. 536.

164. Sooharam v. Doorga Charan 5
C. L. J. 264.

165. Hulodhur v. Gooroo Doss 20
W. R. 126 ; Radha Prosad v. Esut 7
Cal. 411 ; Kamal Kumari v. Kiran Chandra 2 C. W. N. 229.

166. Ramratan v. Aswini Kumar
37 Cal. 559 ; 14 C. W. N. 849 ; 11
C. L. J. 503.

167. Dursan Singh v. Bhawani Koer
17 C. W. N. 981.

168. Nobendra Kishore v. Durga
Charan 15 C. W. N. 515 ; Nityanund
v. Lanshi Chandra 3 C. W. N. 341.

169. S. 50 B. L. R. S. Act XI of
1859 ; see Lukhynarain v. Gorachand
9 Cal. 116 ; 12 C. L. R. 89.

LECTURE IX. was effected before the grant of the putni and the mortgagee obtained a decree on his mortgage before the revenue sale, the mortgagee after he withdrew the surplus sale-proceeds in part satisfaction of the decree, is entitled in satisfaction of the balance of the mortgage-debt to bring to sale that portion of the entire interest in the estate which was protected from sale at the revenue sale but which he could have brought to sale in satisfaction of his decree.¹⁷⁰

The onus lies on the person who alleges that his undertenure is exempted.¹⁷¹ The auction-purchaser is allowed to have the benefit of a certain presumption founded upon the principle that every bigha of land is bound to pay and to contribute to the public revenue, unless it can be brought within certain known and specified exceptions and that the right of the Zemindar to enhance the rent is also presumable until the contrary is shown.¹⁷² Lands situated in a Zemindary must *prima facie* be considered as a part of the Zemindary, unless the contrary is shown.¹⁷³ No hard and fast rule can be laid down as to on whom the burden of proof lies.¹⁷⁴ But when a tenure existed from before the Permanent Settlement, the onus is on the purchaser to prove that the lands in suit were included within the mal lands of the estate.¹⁷⁵

Enhancement
of rent.

Dependent taluks existing at the time of the Permanent Settlement are protected from enhancement by Ss. 5 and 7 Reg. XLIV of 1793. As to those created subsequent to the Permanent Settlement, power is given to the purchaser under S. 6 of Reg. XLIV of 1793 to avoid the subsisting engagement as to rent and to increase the rent to the amount at which, according to the established usage and rate of the pergana or district, it would have stood, had the cancelled engagement so avoided never existed.¹⁷⁶ A Zemindar has no power to enhance the rent of an independent taluk.¹⁷⁷ The

170. Susilabala v. Dinobandhu 14 C. W. N. 186.

171. Rash Behari v. Hara Moni 15 Cal. 555; Preonath v. Kiran Chandra 27 Cal. 290; Harendra Lal v. Salimullah 12 C. L. J. 336; Rutnessur v. Kali Kumar 16 C. W. N. 693.

172. Forbes v. Mahomed Hossein 20 W. R. 44 P. C.; 12 B. L. R. 210; Rash Behari v. Hara Moni 15 Cal. 555; Preonath v. Kiran Chandra 27 Cal. 270; Harendra Lal v. Salimullah 12 C. L. J. 336.

173. Wise v. Bhoobun Moyee 10 Moo. 165; 3 W. R. 5 P. C.; Nistarinee v. Kalipershad 23 W. R. 431.

174. Nittyanund v. Banshi Chandra 3 C. W. N. 341.

175. Halodhar v. Ramendra 16 C. W. N. 980.

176. Surnomoyee v. Suttesschunder 8 Moo. 161; 2 W. R. 14 P. C.; Mohiny Mohun v. Ichamoyee 4 Cal. 612.

177. Hemanta Kumari v. Jagadindra Nath 21 I. A. 131; 22 Cal. 214.

rent of dependent taluk was enhanced by S. 51 Reg. VIII of 1793 upon proof that the landlord could do so either by special custom of the district, or by the conditions under which the talukdar held his tenure, or that the talukdar by receiving abatements from his jama had subjected himself to the increase demanded and that the lands were capable of affording it.¹⁷⁸ The provisions of S. 51 Reg. VIII of 1793 were modified by S. 15 Act X of 1859. Hence, the right of a purchaser was subject to all the modifications contained therein.¹⁷⁹ But S. 37 does not allow the purchaser to assess the rent at a higher rate than that paid before the Permanent Settlement, notwithstanding that no rent was paid for a long series of years.¹⁸⁰ The present law of enhancement of rent of taluk is embodied in S. 6 of the B. T. Act VIII of 1885.

A lease in Cl. 4 S. 37 B. L. R. S. Act XI of 1859 does not mean a lease from the Zemindar only.¹⁸¹ Leases of land which may not have been expressly leased for the purpose of making gardens thereon but on which gardens have subsequently been made are protected.¹⁸² But the proprietor cannot by planting a garden in any portion of his estate become *quod* such portion his own raiyat.¹⁸³ A mokarrari mourashi jungleburi tenure in the Sunderbuns to clear away the jungle and then to cultivate the land with paddy is not land where plantations have been made.¹⁸⁴ The protection extends only to such portion of land as are actually covered by buildings, tanks etc., and not to other lands in the lease not covered by them.¹⁸⁵ Gardens which are not permanent are not

Exceptions—
(a) Dwelling house, &c.

178. Sattyasaran v. Mohesh Chandra 12 Moo. 263; 11 W. R. 10 P. C.; 2 B. L. R. P. C. 23; Bama Soonduree v. Radhika Chowdhurani 13 W. R. 11 P. C.; Assanooallah v. Obhoy Churn 13 Moo. 317; 13 W. R. 24 P. C.; Nobo Kishen v. Mazamooddeen 19 W. R. 439; Nilmonee v. Chunder kant 2 Cal. 125; 25 W. R. 200; Bissessuri v. Hem Chunder 14 Cal. 133; Hurronath v. Gobind Chundar 23 W. R. 352 P. C.; Mohiny Mohun v. Ichamoyee 4 Cal. 612.

179. Purnanund v. Rookinee 4 Cal. 793.

180. Brindaban v. Bhawani 35 Cal. 931; 9 C. L. J. 119.

181. Kiron Chunder v. Naimuddi 30 Cal. 498.

182. Gobind Chundra v. Joy Chundra 12 Cal. 327; Bhago Bibee v. Ram Kant 3 Cal. 293; Grish Chunder v. Gunga Doorga 25 W. R. 60.

183. Bool Chaud v. Luthoo 23 W. R. 387.

184. Bholanath v. Umachurn 14 Cal. 440.

185. Wahid Ali v. Rahat Ali 12 C. W. N. 1029; but see Kiron Chunder v. Naimuddi 30 Cal. 498; Najemoddin v. Hassan Hyder 9 C. W. N. 852; Makar Ali v. Shyama Charan 3 C. W. N. 212; Sooharam v. Doorga Charan 5 C. L. J. 264.

LECTURE IX. protected.¹⁸⁶ But although a person may fail to show that the tenure was created prior to Permanent Settlement, yet he is entitled to the protection in respect of any permanent structure that may be in his holding.¹⁸⁷ A dwelling house to be exempted must be of a permanent character, whether created by the present holder or by some previous occupier.¹⁸⁸

(b) Occupancy right.

The purchaser shall not be entitled to eject an occupancy raiyat or to enhance his rent otherwise than in the manner prescribed by the laws in-force or otherwise than the former proprietor irrespective of any engagement may have been entitled to do.¹⁸⁹ A right of occupancy can be acquired in a tank forming an integral part of an agricultural holding and as such is protected.¹⁹⁰ But a lease of tank without any portion of the surrounding land is not protected.¹⁹¹ The right of occupancy may be acquired under laws promulgated since 1859.¹⁹² The onus is upon the defendant to show that at the date of the plaintiff's purchase he was an occupancy raiyat of land within the ambit of the estate.¹⁹³ Receipt of rent by the auction-purchaser, might give rise to a presumption that the land was let for purpose for which it was let and the rent was reasonable at the time it was let.¹⁹⁴ A tenant is entitled to rely on his right of occupancy, although the mokurrari lease may be invalid.¹⁹⁵

Purchase by defaulter is not void.

The Collector is bound to sell to the highest bidder even though he be the defaulter himself or his benamdar.¹⁹⁶ One joint tenant, however, cannot acquire for his own benefit an adverse or outstanding

186. Chandra Kumar v. Chaitanya Charan 18 C. L. J. 232.

187. Najemoddin v. Hassau Hyder 9 C. W. N. 852; Gobind Chundra v. Joy Chundra 12 Cal. 327; Bhago Bibee v. Ram Kant 3 Cal. 293; Ajgur Ali v. Asmut Ali 8 Cal. 110; 10 C. L. R. 87.

188. Makar Ali v. Shyamti Charan 3 C. W. N. 212; Kiron Chunder v. Naimuddi 30 Cal. 498; Ajgur Ali v. Asmut Ali 8 Cal. 110; 10 C. L. R. 87.

189. Prov. S. 37 B. L. R. S. Act XI of 1859.

190. Uma Charan v. Moni Ram 8 C. W. N. 192; Jardine, Skinner & Co. v. Sant Soolal 5 I.A. 164; 3 C. L. R. 119.

191. Asmat Ali v. Hasnat Khan 2 C. W. N. 412.

192. Sarat Chandra v. Asiman 31 Cal. 725; 8 C. W. N. 601; Baidya Nath v. Sudharam 8 C. W. N. 751.

193. Ambika v. Dya Gazi 10 C. W. N. 497.

194. Juggodeshury v. Uma Charan 7 W. R. 237.

195. Nilmadhab v. Shibu Pal 13 W. R. 410; 5 B. L. R. App. 18; Purushottam Purtap 11 W. R. 253; Tiluk Chunder v. Suttyanund 20 W. R. 315.

196. Doorga Singh v. Sheo Pershad 16 Cal. 191; Cornell v. Ooly Tara 8 W. R. 372; Gonesh Pershad v. Brij Behary 1 C. L. J. 565; Kalee Doss v. Mothooranath 5 W. R. 154; Neynum v. Muzuer 21 W. R. 265.

title or encumbrance against the joint estate ; but such acquisition will enure to the joint benefit of him and his cotenants, provided the other joint tenants elect within a reasonable time to avail themselves of such adverse title and contribute their rateable share of the expense of acquiring it. So, when a cosharer made default deliberately and brought about the sale fraudulently that he might buy up the property at a small price, the purchase was made on behalf of all the cosharers and he should reconvey it to others upon his being paid the purchase-money.¹⁹⁷ But the fact that a cosharer intentionally defaulted in payment of arrears,¹⁹⁸ or that he deterred others from bidding for the property,¹⁹⁹ does not necessarily constitute fraud. Nor, is it fraud to combine not to bid against each other.²⁰⁰ A suit by a cosharer for setting aside a sale on the ground that the purchase by a cosharer was made fraudulently in the benami of another is not barred by one year's rule under S. 33 Act XI of 1859 ; such a suit may be brought within three years from the date when fraud becomes known to the party wronged.²⁰¹

Excepting sharers with whom separate accounts have been opened under Ss. 10 and 11 B. L. R. S. Act XI of 1859, any recorded or unrecorded proprietor or copartner who may purchase, or by repurchase or otherwise recover possession of the estate sold for arrears or demands other than those accruing upon itself shall acquire the estate, subject to all incumbrances existing at the time of sale and shall not acquire any rights in respect to undertenants or raiyats not possessed by the previous proprietor at the time of sale.²⁰² The purchaser acquires the estate subject to all incumbrances existing at the time of sale, whether created before or after default and even up to the date of sale. Such a purchaser is in the same position whether he purchases through a third party or purchases it from

LECTURE IX.

His rights.

197. *Ganesh Pershad v. Brij Behuri* 1 C. L. J. 565 ; *Ram Prasad v. Pawan Singh* 18 C. L. J. 97 ; *Faizur Rahman v. Maimuna Khatun* 17 C. W. N. 1233 ; 18 C. L. J. 111 ; *Bhoobun Chunder v. Ram Soondar* 3 Cal. 300 ; *Amirumessa v. See. of State* 10 Cal. 63 ; 13 C. L. R. 131 ; *Janki Singh v. Debinandan* 15 C. W. N. 776 ; *Deonandan v. Manbodh* 32 Cal. 111 ; 8 C. W. N. 757 ; *Harendra Lal v. Purna Chandra* 15 C. L. J. 132 ; *Doorga Singh v. Sheo Pershad* 16 Cal. 191.

198. *Rambeyas v. Sheoji Singh* 5 C. L. J. 64.

199. *Durga Singh v. Sheo Pershad* 16 Cal. 194.

200. *Gobind Chundra v. Sherajunnissa* 13 C. L. R. 1.

201. Art. 95 Sch. 1 Limitation Act 1X of 1908 ; *Panchkouri v. Pran Gopal* 13 C. W. N. 518.

202. S. 53 B. L. R. S. Act XI of 1859 ; see *Imambandi v. Kamaleswari* 13 I. A. 160 ; 14 I. ad 109.

LECTURE IX. a third party after the latter has purchased it for himself.²⁰³ A purchase by a person who has purchased the estate in arrear at an execution sale after default has been made in the payment of revenue is a purchase by a proprietor.²⁰⁴ When the defaulter made a secret arrangement with the purchaser to enjoy profits of the transaction, the purchaser does not acquire the rights and privileges of a purchaser at a revenue sale.²⁰⁵ So, where the plaintiff purchased the estate at a sale for arrears of revenue in the name of his servant and on his default again purchased it, he could not avoid any incumbrance, he himself being the defaulter.²⁰⁶ Similarly, where the plaintiff, a putnidar of the purchaser, is a benamdar of the defaulter he cannot avoid an incumbrance.²⁰⁷

ii. Share of an estate. A separate account opened in clear contravention of Ss. 10 and 11 B. L. R. S. Act XI of 1859 will not confer on the person who obtains a separate account the statutory privileges of S. 53.²⁰⁸ When a share of an estate is sold under S. 13 or S. 14 the purchaser shall acquire the share, subject to all incumbrances and shall not acquire any rights not possessed by the previous owner.²⁰⁹ When the Collector erroneously supposed that the share in default was much larger than it really was and exposed for sale the share of the plaintiff, of which no default was made, the sale did not affect their rights.²¹⁰ A valid mokurrari lease held by some of the defaulting proprietors of the share sold is not void against the purchaser.²¹¹ An attachment of property does not constitute an incumbrance.²¹²

Incumbrances executed in contemplation of an impending sale, or in fraud of a possible purchaser are not protected.²¹³ Where a

203. Mahomed Gazeer v. Peuree Mohun 16 W. R. 136; 7 B. L. R. App. 52; Alum Manjee v. Ashad Ali 16 W. R. 138.

204. Shyam Kumari v. Rameswar Singh 31 I. A. 176; 32 Cal. 27; 8 C. W. N. 786; Ablool Buri v. Ramaless 4 Cal. 607; 3 C. L. R. 228.

205. Sidhee Nuzur Ally v. Ojoodhiya-ram 10 Moo. 540; 5 W. R. P. C. 83; Stimath v. Haro Nath 18 W. R. 240; 9 B. L. R. 229; Harendra Lal v. Sadimullah 12 C. L. J. 336.

206. Matizuddin v. Korbad Ali 31 Cal. 393; 8 C. W. N. 115.

207. Resh Behuri v. Harry Mon 15 Cal. 555.

208. Mehli Hassan v. Sheoshunkar 39 Cd. 353; 16 C. W. N. 817; 14 C. L. J. 552.

209. S. 51 B. L. R. S. Act XI of 1859. 210. Gogti Pershad v. Ishrat Ali 15 C. L. J. 54.

211. Afzal Hossein v. Rabbans Saeed 30 Cd. 1074; Kashinath v. Bankubehari 12 W. R. 410; 3 B. L. R. 416; Madhub v. Promotho 20 W. R. 264.

212. Mahadeo Saran v. Thakur Prosad 11 C. W. N. 677; 11 C. L. J. 528.

213. Monohur v. Joy Kishen 5 W. R. 1.

former proprietor had right to resume and assess an alleged lakhraj land the purchaser acquires the same right.²¹⁴ All incumbrances created after the date on which a purchase takes effect, *i.e.*, after the date on which the default was committed, are void.²¹⁵ The interest of reversionary heir is not an incumbrance; hence, where a share of an estate held by a Hindu widow was sold, the purchaser did not take any interest limited to life of the widow but the entire share.²¹⁶ The purchaser shall not acquire any rights not possessed by the previous owner at some time or another and shall acquire no more than what was the property of the previous owner.²¹⁷ The sale passes to the purchaser not the right, title, and interest but the share of the defaulter as registered in the Collectorate, *i.e.*, an undivided share in the entire estate and not such portion as the defaulting shareholder might have chosen as between himself and other shareholders to take as an equivalent.²¹⁸ The purchaser is not a person claiming from or through the defaulter. In a suit for possession by him when he has never been in possession after his purchase, the defendant must show that his possession was adverse to him for more than 12 years and the fact that adverse possession commenced before the default is immaterial.²¹⁹ If the adverse possession was completed before default, the default must be treated as default of the person who has acquired title by adverse possession and the sale would pass his interest. Were it otherwise, the result would be that all revenue-paying estates or shares of estates in the possession of trespassers would after the lapse of 12 years become revenue-free.²²⁰

Where a transfer of a share is made before default, either voluntarily or by judicial sale, the right of the transferee on such

214. Debee Munnee v. Faqueer Chunder W. R. 1864, 293.

215. Jogessur v. Khetter Mohun 17 Cal. 148; Umatara v. Uma Charan 3 C. L. J. 52; Khobhari Singh v. Ram Prosad 7 C. L. J. 387.

216. Bunabati v. Monmootho Nath 11 C. W. N. 821; Bilas Chandra v. Akshoy Kumar 16 C. W. N. 587; 15 C. L. J. 436; Debi Das v. Bipro Charan 22 Cal. 611.

217. Anno la Prosad v. Rajendra Kumar 29 Cal. 223; 6 C. W. N. 375.

218. Bhawani Koer v. Mathura

Prasad 7 C. L. J. 1; Gungadeen v. Kheero 22 W. R. 449; 14 B. L. R. 170; Monohur v. Joy Kishen 6 W. R. 315; Kalanand v. Sarafat 12 C. W. N. 528; Rahimuddi v. Nalini Kanta 13 C. W. N. 407.

219. Kalanand v. Sarafat 12 C. W. N. 528; Bilas Chandra v. Akshoy Kumar 16 C. W. N. 587; 15 C. L. J. 436.

220. Kalanand v. Sarafat 12 C. W. N. 528; Rahimuddi v. Nalini Kanta 13 C. W. N. 407; Bilas Chandra v. Akshoy Kumar 16 C. W. N. 587; C. L. J. 436.

LECTURE IX. transfer passes to the purchaser.²²¹ When default is made between the date of a sale in execution of a mortgage-deeree and the confirmation of the sale, the purchaser at a sale for arrears of revenue gets the property free from the mortgage lien.²²² A mortgage of a share of an estate executed between the date of default and the date of sale is invalid against the purchaser.²²³ But where a mortgagee has obtained a decree on the mortgage before the revenue sale, the principle of *lis pendens* applies and the purchaser at the revenue sale acquires the share subject to the mortgage.²²⁴

Application
of purchase-
money.

The purchase-money shall be applied to the liquidation of (1) all arrears due upon the latest day of payment from the estate or share of an estate sold (2) all outstanding demands debited to the estate or share of an estate in the public accounts of the district. The residue if any, shall be paid to the recorded proprietors jointly or in shares proportioned to their recorded interest in the estate or share of an estate sold; but if before payment to the late proprietors the money be claimed by any creditor in satisfaction of a debt it shall not be paid to such creditor, nor withheld from the proprietors without an order of a Civil Court.²²⁵ The Collector is justified in refusing to pay the residue to an assignee of the recorded proprietor claiming the money on his own behalf.²²⁶

The Collector holds the residue in trust for a specific purpose and therefore the Limitation Act has no operation. A suit for the residue against the Secretary of State should at least be governed by Art. 120 Sch. I Limitation Act IX of 1908.²²⁷ The mortgagee's

221. Kalanand v. Sarafat 12 C.W.N. 528; Annoda Prosad v. Rajendra Kumar 29 Cal. 223; 6 C.W.N. 375; Bhawani Koer v. Mathura Prosad 7 C.L.J. 1; Gungadeen v. Kheeroo 14 B.L.R. 170; 22 W.R. 449.

222. Bhawani Kuwar v. Mathura Prosad 39 I.A. 228; 10 Cal. 89; 16 C.W.N. 985; 16 C.L.J. 606, reversing 7 C.L.J. 1.

223. Umatara v. Uma Charan 3 C.L.J. 52.

224. Har Shankar v. Shew Gobind 26 Cal. 966; 1 C.W.N. 317; Raj Kishore

v. Jadu Nath 11 C.W.N. 828; Mahomed Tayab v. Hem Chandra 10 C.L.J. 590; Prem Chand v. Purnima Dasi 15 Cal. 546; Bhawani Koer v. Mathura Prasad 7 C.L.J. 1; see also Madan Lal v. Bhagwan Das 21 All. 235.

225. S. 31 B.L.R. S. Act XI of 1859.

226. Sec. of State v. Marjum Hossein 11 Cal. 359.

227. Sec. of State v. Gurur Prasad 20 Cal. 51 F.B.; see the observations of Pigot J.

lien is transferred from the property to the balance of sale-proceeds.²²⁸ The period of limitation for a suit on a mortgage, whether executed before or after default to recover the money, is not shortened by the revenue-sale but remains the same under the Limitation Act.²²⁹ The sale-proceeds become available to the mortgagee-decreeholder as soon as the decree becomes absolute.²³⁰

228. S. 73 T. P. Act IV of 1882; C. W. N. 356; Umatara v. Uma Hurdeo v. Fuzla Hossein 1 W. R. 270.

Charan 3 C. L. J. 52.

229. Kamala Kant v. Abdul Barkat 27 Cal. 180; Jogessur v. Ghamasham 5 230. Gopi Krishna v. Ram Lal 14 C. W. N. 184.

LECTURE X.

Compulsory Sales for arrears of Public Demands in Bengal.

The words, "Public demand," include (1) an arrear of revenue which remains due after an estate, tenure, or any share of either has been sold for arrears of revenue due thereupon under B. L. R. S. Act XI of 1859 or Act VII (B. C.) of 1868 and the sale-proceeds are insufficient to liquidate the arrears of revenue, or (2) an arrear of revenue due from a farmer on account of an estate held by him in farm, remaining unpaid on the latest day of payment fixed under S. 3 of Act XI of 1859, or (3) any money recoverable as an arrear of revenue, or by the process prescribed for the recovery of arrears of revenue, or (4) any money declared by any enactment in force (i) to be a demand or a public demand, or (ii) to be recoverable as arrear of a demand or as a demand or public demand, or (iii) to be recoverable under B. L. R. Sales Act VII (B. C.) of 1868, or (5) any money due from the sureties of a farmer in respect of the revenue of the estate farmed by him, or (6) any fees or costs awarded by a Revenue Authority, or (7) any demand payable to the Collector by any tenant in respect of any interest in land, pasture, forest rights, fisheries or the like, or (8) any arrears of rent or of other demands recoverable as rent due in respect of property under the charge of, or managed by, the Court of Wards, or the Revenue Authorities on behalf of a private individual, whether such arrears became due before or after the management devolved upon such Court or Authorities, or (9) any money payable to a Government Officer or a local authority and agreed under a duly registered instrument to be recoverable as a public demand, or (10) any stamp duty payable under the Estates Partition Act V (B. C.) of 1897, or (11) any money due from a farmer of tolls or from his sureties, or (12) any money awarded as a compensation under S. 2 B. L. R. S. Act VII (B. C.) of 1868, or (13) any money due from a purchaser at a sale held under the Act.¹

When the Certificate Officer *i.e.*, the Collector, Subdivisional Officer, or any other officer appointed to perform the functions of a Certificate Officer is satisfied that any public demand payable to the Collector is due, he shall sign a certificate stating that the demand is due and cause it to be filed in his office.²

1. Sch. I P. D. R. Act III (B.C.) of 1913. 2. S. 4 P. D. R. Act III (B.C.) of 1913

When any public demand is due to any person other than the Collector, such person may send to the Certificate Officer a written requisition.³ A certificate cannot be issued for costs of partition under Reg. XIX of 1814 which are not in arrear without demand after sanction by the Board of Revenue and by the Lieutenant-Governor.⁴ Nor, can it be issued for the realization of costs given to a party in a land registration proceeding.⁵ If, in an area for which a record of rights has been prepared and finally published and is maintained, the Local Government has sanctioned the application of the procedure prescribed by the P. D. R. Act III (B. C.) of 1913 to the recovery of arrears of rent due to landlord, whether an entire body of landlords or one or more co-sharer landlords who collects or collect his or their share or shares of the rent separately, he or they may make a similar requisition to the Certificate Officer. The requisition shall in every case be signed and verified and must bear a Court-fee stamp payable under the Court Fees Act VII of 1870 on a plaint for the recovery of the same amount.⁶

If the Certificate Officer is satisfied that the demand is recoverable and that recovery by suit is not barred by law, or that the rent in arrear is due, he shall sign a certificate stating that the demand or arrear is due and cause it to be filed in his office.⁷ But no certificate shall be issued for the recovery of arrears of rent of a tenancy, if regarding the rent and the status of the tenant a suit has been pending in a Civil Court. Nor, during the pendency of a certificate proceeding shall a landlord institute a suit in a Civil Court for the recovery of the same arrears of rent, nor shall the tenant after the issue of a certificate against him institute a suit in a Civil Court for alteration of the rent payable by him or the determination of his status as a tenant in respect of the period for which the certificate was issued.⁸ Where rent is payable jointly, the Collector cannot issue a certificate for a proportionate share of the rent due to an estate under the Court of Wards.⁹

3. S. 5 P. D. R. Act III (B.C.) of 1913.

7. Ss. 6, 60 P. D. R. Act III (B.C.) of 1913.

4. Har Gopal v. Ram Golam 5 B. L. R. 135 ; 13 W. R. 381.

8. S. 60 P. D. R. Act III (B.C.) of 1913.

5. Majir Baksh v. Sadagar Mia 7 C. W. N. 568.

9. S. 60 P. D. R. Act III (B.C.) of 1913 ; Girjanath v. Ram Narain 20 Cal. 261.

6. Ss. 5, 60 P. D. R. Act III (B.C.) of 1913.

LECTURE X.

Formalities
must be
observed.

The justification for the extra legal powers conferred by the Act is that they are to be exercised by an officer whose rank implies the possession of qualities necessary for the due exercise of such powers. When a certificate was not signed by an officer authorized to sign it, or a lithographed signature was attached, the certificate was not duly made.¹⁰ But a certificate, signed by a person who was really the Certificate Officer but signed in an old form where the word, "Collector," occurred, is not invalid.¹¹ The safeguards provided by the Act for the exercise of the tremendous powers may or may not be sufficient to prevent these powers from being sometimes used harshly and improperly, but such as they are, they must be strictly enforced and the form of procedure laid down in the Act must be strictly followed.¹² As an exact compliance with the formalities prescribed by the Legislature is absolutely necessary, the certificate must specify the sum and the person from whom it is due.¹³ Thus, where the arrears of Road Cess were due from an estate, a certificate issued in the name of the former proprietor of the estate is invalid.¹⁴ So, under S. 38 of the Bengal Drainage Act VI (B. C.) of 1880 as amended by Act II (B. C.) of 1902, the person liable to satisfy the engagement entered into with the Secretary of State for India in Council is the person who gave it, and a person who purchased a portion of the estate at a sale held by a Receiver, appointed to liquidate debts of the estate, is not liable to be proceeded against.¹⁵

Notice of
certificate.

When a certificate has been filed the Certificate Officer shall issue to the certificate-debtor, *i.e.*, the person named as debtor in the certificate, a copy of such certificate and a notice to show cause within 30 days from the date of service why the certificate should not be executed.¹⁶ Notice must be issued by the Certificate Officer in whose Court it is originally filed and when the Certificate is sent to another Certificate Officer it is not necessary to serve a second notice.¹⁷

10. Baij Nath v. Ramgat Singh 5 C. L. J. 687.

414 ; Abdul Hai v. Gajraj 20 I. A. 70 ; 20 Cal. 826 ; Shekaat Hosain v. Sasi Kar 19 Cal. 783 ; Rupram v. Iswar Nama-sudra 6 C. W. N. 302.

11. S. 59 P. D. R. Act III (B.C.) of 1913 ; Barhamdeo v. Rasul Bandi 32 Cal. 691 ; 1 C. L. J. 360.

15. Nogendrabala v. Sec. of State 18 C. W. N. 944 ; 19 C. L. J. 610.

12. Baij Nath v. Ramgat Singh 5 C. L. J. 687.

16. S. 7 P.D.R. Act III (B.C.) of 1913.

13. Sch. II r.r. 64, 65, Form No. 1 App. P. D. R. Act III (B.C.) of 1913.

17. S. 12 P. D. R. Act III (B.C.) of 1913 ; see Uzirali v. Kartick 2 C. W. N. 363.

14. Gujraj v. Sec. of State 17 Cal.

Service of notice shall be made by delivering or tendering a copy thereof signed by the Certificate Officer to the judgment-debtor and when he cannot be found, on any adult male member of his family residing with him and if such adult member cannot be found, by affixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business, or by affixing a copy thereof in some conspicuous place in the office of the Certificate Officer issuing the same and also in some conspicuous part of the land, if any, affected by the service of the notice. The notice may also be sent by post addressing to the judgment-debtor at his known residence.¹⁸ The word, "adult," does not mean a person who has attained majority within the meaning of the Majority Act IX of 1875, but a person of such an age as to be capable of, and responsible for, the due communication of the notice to the member of the family for whom it is intended.¹⁹ The return of the officer stating that the notice was duly served is *prima facie* proof of such service.²⁰

Service of notice is absolutely necessary and the procedure prescribed as to the mode of service should be strictly followed.²¹ But a sale shall not be void on the mere ground that the notice has not been served.²² Mere knowledge of the issue of a certificate is not sufficient by itself to cure or make up for the absence of due service of notice.²³ Substituted service cannot be accepted as sufficient, unless it is proved that the conditions under which a recourse might be had to it existed.²⁴ When the service is denied the onus is on the party alleging service to prove it.²⁵

From and after the service of notice of the certificate, any private transfer of any immoveable property, situate in the district in which the certificate is filed or any interest in such property, shall be void

Effect of
service of
notice.

18. Sch. II r.r. 2, 9 P. D. R. Act III (B.C.) of 1913.

19. Hari Charan v. Chandra Kumar 35 Cal. 286 affg. 34 Cal. 787; 11 C. W. N. 745.

20. Bepin Behary v. Sosi Bhushan 18 C. L. J. 628.

21. Umed Ali v. Raj Lakshmi 33 Cal. 84; 10 C. W. N. 130; 1 C. L. J. 538.

22. S. 36 P. D. R. Act III (B.C.) of 1913.

23. Girish Chandra v. Golam Karim 33 Cal. 451; 10 C. W. N. 317; 3 C. L. J.

235; Ambika Prosad v. Gopal Buksh 1 C. L. J. 550; Ramrup v. Khushal 3 C. L. J. 280; Umed Ali v. Raj Lakshmi 33 Cal. 84; 10 C. W. N. 130; 1 C. L. J. 538.

24. Jogeshwar v. Debi Prasad 5 C. L. J. 555; Ramrup v. Khushal 3 C. L. J. 280; Umed Ali v. Raj Lakshmi 33 Cal. 84; 10 C. W. N. 130; 1 C. L. J. 538; Ambika Prosad v. Gopal Buksh 1 C. L. J. 550.

25. Rakhal Chandra v. Sec. of State 12 Cal. 603.

LECTURE X. against any claim enforceable in execution of the certificate and the amount due on the certificate is a charge on the immoveable property wherever situated and is superior to every other charge subsequently created.²⁶ A certificate is perfected by the issue of a notice which alone gives it the force of a decree. Until service of notice no particular property is bound by the certificate, just as in the case of an ordinary money decree before the attachment. The effect of the service of notice is as if the property of the certificate-debtor were attached.²⁷

Under Act I (B. C.) of 1895 the service of notice was essential to the validity of the certificate and although there might not be any irregularity in the publication or the conduct of the sale in execution of the certificate, there having been no foundation for the sale, it should be set aside as having been made without jurisdiction, without the certificate being set aside.²⁸

The certificate-debtor may, at any time within 30 days from service of notice, or where no such service was made, within 30 days from the execution of any process for enforcing such certificate, file before the Certificate Officer, a petition of objection signed and verified in the manner prescribed, denying his liability in whole or in part of the amount for which the certificate has been made.²⁹ The petition of objection may be filed in the office of the Certificate Officer executing the certificate but he cannot try the validity of the certificate ; the petition must be heard by the Certificate Officer in whose office the original certificate is filed who may, upon hearing the objections, set aside or modify or vary the certificate and if in his opinion the petition involves a *bona fide* claim of right, he shall refer the petition to the District Collector who, if satisfied

26. S. 8 P. D. R. Act III (B.C.) of 1913.

27. Baij Nath v. Ramgut Singh 23 I. A. 45 ; 23 Cal. 775 ; Abdul Hai v. Gajraj 20 I. A. 70 ; 20 Cal. 826 ; Hari Charan v. Chandra Kumar 31 Cal. 787 ; 11 C. W. N. 745.

28. Baij Nath v. Ramgut Singh 23 I. A. 45 ; 23 Cal. 775 ; Saroda Charan v. Kisto Mohan 1 C. W. N. 516 ; Elokeshi v. Abinash 5 C. L. J. 638 ; Chunder Kumar v. Sec. of State 27 Cal. 698 ; 4 C. W. N. 586 ; Gopal Dass v. Hardeo

Das 5 C. W. N. 86 ; Ranrup v. Khushal 6 C. W. N. 630 ; Janki Das v. Ram Golam 28 Cal. 813 ; 6 C. W. N. 331 ; Ambika Prosad v. Gopal Buksh 1 C. L. J. 550 ; Siinath v. Bishen 2 C. L. J. 504 ; Syamlal v. Nilmony 31 Cal. 211 ; 5 C. L. J. 385 ; Jogeshwar v. Debi Prasad 5 C. L. J. 555 ; Purna Chandra v. Dina-bandhu 31 Cal. 811 ; 11 C. W. N. 756 ; 5 C. L. J. 696.

29. S. 9 P. D. R. Act III (B.C.) of 1913.

that *bona fide* claim of right of property is involved, shall cancel the certificate.³⁰ The Certificate Officer shall have full power to direct by whom the costs of, and incidental to, any proceedings shall be paid and if he is satisfied that any requisition was made without reasonable cause, he may award compensation to the certificate-debtor and the amount awarded shall be recoverable as public demands.³¹

An appeal from any original order of a Certificate Officer other than a District Collector, may be preferred to the District Collector within 15 days from the date of the order, and an appeal from an original order of a District Collector may be preferred to the Commissioner within 30 days from the date of the order. Pending the decision of such appeal execution may be stayed by order of the appellate authority.³² Any superior revenue authority can revise the orders of an officer immediately subordinate to him. Thus, the Board of Revenue, the Commissioner, and the Collector have jurisdiction to revise orders respectively of the Commissioner, the Collector and the Certificate Officer made before, as well as, after the sale and when so acting on the revisional jurisdiction the periods of limitation applicable in ordinary cases do not apply.³³ Any order passed by any officer may be reviewed by him or his successor in office on account of any mistake or error either in the making of the certificate or in the cause of any proceeding.³⁴

A certificate may be executed by the Certificate Officer in whose Court the original certificate is sent. Where a Certificate Officer had no jurisdiction to send a certificate to another Court, the proceedings are void *ab initio*.³⁵ It is only when no objection is taken to the certificate within the prescribed period, or when it is finally dismissed, that the certificate becomes absolute.³⁶

No step in execution of a certificate shall be taken until 30 days have elapsed from the date of the service of notice on the certificate-debtor, or until the disposal of his petition, if any, denying liability in whole or in part.³⁷ But if the Certificate Officer is satisfied that

30. S. 10 P. D. R. Act III (B.C.) of 1913; see Nagendrabala v. Secy. of State 14 C. L. J. 83.

31. Ss. 45, 46 P. D. R. Act III (B.C.) of 1913.

32. S. 51 P. D. R. Act III (B.C.) of 1913.

33. S. 53 P. D. R. Act III (B.C.) of 1913.

34. S. 51 P. D. R. Act III (B.C.) of 1913; Pryag v. Joy Narayan 22 Cal. 419.

35. Girish Chandra v. Golam Karim 33 Cal. 451; 10 C. W. N. 347; 3 C. L. J. 235.

36. Hari Charan v. Chandra Kumar 31 Cal. 787; 11 C. W. N. 745.

37. S. 13 P. D. R. Act III (B.C.) of 1913.

Appeal.

Execution of certificate.

LECTURE X.

the certificate-debtor is likely to conceal, remove or dispose of the whole or any part of his moveables which would be liable to attachment in execution of a decree of a Civil Court, and that the realisation of the amount of the certificate would be delayed or obstructed, he may at any time direct the attachment of such moveables.³⁸

Mode of satisfaction.

A certificate may be executed against the person or property of the certificate-debtor but the Certificate Officer may refuse execution at the same time against both.³⁹ Execution of certificate against the property may be effected by attachment of any decree or by sale with or without attachment of property, liable to be attached and sold in execution of a decree of a Civil Court.⁴⁰ The fraudulent removal, concealment, transfer or delivery to any person of any property, intending thereby to prevent that property from being taken in execution of a certificate is an offence punishable under S. 206 I. P. C. Act XLV of 1860.⁴¹

A debt under the P. D. R. Act III (B. C.) of 1913 is nothing but a debt and the law laid down in Ss. 69, 70 I. C. Act IX of 1872 which is nothing more than a codified statement of the general law applies.⁴² There is nothing in the Act to take away the jurisdiction of the Civil Court to entertain an application by the certificate-debtor to be adjudged an insolvent where the debts are enforceable under the Act.⁴³

Payment of money due under a certificate may be made by instalments if the Certificate Officer so directs, and when the total amount is paid, satisfaction shall be entered upon the certificate, as well as in the Collector's register.⁴⁴ Every certificate may be enforced and executed with interest at the rate of $6\frac{1}{4}$ p. c. per annum from the date of the signing of the certificate up to the date of realization and costs and all charges incurred in respect of the service of processes and all other proceedings taken for realizing the demand.⁴⁵

A Certificate Officer has authority to sell only so long as the certificate remains unpaid; upon the arrears being paid in the

38. S. 13 P. D. R. Act III (B.C.) of 1913.

42. Nandan Misser v. Harakh Narain 14 C. W. N. 607 ; 11 C. L. J. 266.

39. S. 14 P. D. R. Act III (B.C.) of 1913.

43. Kedar Bans v. Janki Koeri 14 C. W. N. 143.

40. Ss. 14, 17, P. D. R. Act III (B. C.) of 1913.

44. Sch. II r.r. 59-63 P. D. R. Act III (B. C.) of 1913.

41. S. 58 P. D. R. Act III (B. C.) of 1913.

45. S. 16 P. D. R. Act III (B. C.) of 1913.

treasury it becomes his statutory duty to enter satisfaction upon the certificate. The neglect of this duty cannot give the Collector statutory power to sell in execution the property of a person who owes nothing.⁴⁶

No certificate shall cease to be in force by reason of (a) the property to which the demand relates ceasing to be under the charge or management of the Court of Wards or the revenue authorities or (b) the death of the certificate-debtor.⁴⁷ When the certificate debtor dies before the certificate has been fully satisfied it may be executed against the legal representative of the deceased who shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of.⁴⁸

The Bengal Public Demands Recovery Act III (B. C.) of 1913 unlike its predecessor Act I (B. C.) of 1895 as amended by Act I (B. C.) of 1897 is in itself a complete Code. It lays down the exact procedure to be observed in executing a certificate instead of making certain portions of the Civil Procedure Code applicable to the execution thereof as if they formed part of it. Under Act I (B. C.) of 1895 the certificate had the effect of a decree of a Civil Court for money and consequently the procedure laid down in the Civil Procedure Code for the execution of a decree for money equally applied to the execution of a certificate. But under Act III (B. C.) of 1913 the Legislature has made a complete departure from this principle. The certificate for arrear of rent due from a tenure or holding in areas in which Chapter XVI of the Bengal Tenancy Act VIII of 1885 is in force, has the same effect as a decree for arrear of rent, but a certificate for public demands has only the effect of a decree for money. But the mode of attachment (though immoveable property need not be attached before sale), investigation of claims and objections to the attachment or sale of any property and delivery of property sold in execution of a certificate, whether for arrear of rent or for public demand, are similar to the corresponding provisions in the Civil Procedure Code Act V of 1908.⁴⁹ Thus,

46. Abdul Hai v. Gajraj 20 I. A. 70; 20 Cal. 826; Gujraj v. Sec. of State 17 Cal. 414; Nandun Misser v. Harakh Narain 14 C. W. N. 607; 11 C. L. J. 266.

47. S. 42 P. D. R. Act III (B. C.) of 1913.

48. S. 43 P. D. R. Act III (B. C.) of 1913.

49. Cf. Ss. 18, 19, 21, 27, Sch. II r.r. 13-28, 30-41, 46, 48-49 P. D. R. Act III (B.C.) of 1913 with Ss. 60, 61, 66, O. 41 r.r. 41-63 C. P. C. Act V of 1908.

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where a tenure or holding at fixed rates or an occupancy holding situated in an area in which Chapter XIV of the Bengal Tenancy Act VIII of 1885 is in force is to be sold in execution of a certificate for arrear of rent due in respect thereof, the mode and effect of sale are substantially the same as in execution of a rent decree, provided the certificate holder is not a co-sharer landlord and the certificate is not for his share of the rent only.⁵⁰

**Effect of payment by
(1) a person whose interest is voidable on the sale,**

When any person having in a tenure or holding advertised for sale in execution of a certificate for arrears of rent due in respect thereof, an interest which would be voidable upon the sale, pays into Court the amount requisite to prevent the sale, in addition to any other remedy to which he may be entitled, (a) the amount so paid by him shall be deemed to be a debt bearing interest at $12\frac{1}{2}$ p. c. per annum and secured by a mortgage of the tenure or holding to him (b) his mortgage shall take priority over every other charge on the tenure or holding other than a charge for arrear of rent (c) he shall be entitled to take possession of the tenure or holding as mortgagee of the tenant and to retain possession of it as such until the debt with interest due thereon has been discharged.⁵¹

(2) an inferior tenant.

When an inferior tenant whose interest would be voidable upon the sale pays into Court money due from a superior tenant to prevent the sale, he may, in addition to any other remedy provided for him by law, deduct the amount so paid from any rent payable by him to his immediate landlord; and that landlord, if he is not the defaulter, may in like manner deduct the amount so deducted from any rent payable by him to his immediate landlord and so on, until the defaulter is reached.⁵²

**Sale set aside before confirmation.
i. Payment.**

Where immoveable property has been sold, the certificate-debtor or any person whose interests are affected by the sale may, within 30 days from the date of the sale, apply to the certificate-officer to set aside the sale on depositing (a) the amount specified in the proclamation of sale with interest at $12\frac{1}{2}$ p.c. per annum from the date of the certificate to the date of the deposit (b) a sum equal to 5 p.c. of the purchase-money but not less than one rupee (c) all outstanding charges certified by the Collector to be due to the Government, provided he has not been prosecuting an application

50. Cf. Sch. II r.r. 29, 42, 43, 44,
45, 47 P. D. R. Act III (B. C.) of 1813
with Ss. 163, 164, 165, 166, 173, B. T.

51. S. 63 P. D. R. Act III (B. C.) of
1913; S. 171 B. T. Act VIII of 1885.
52. S. 64 P. D. R. Act III (B. C.) of
1913; S. 172 B. T. Act VIII of 1885.

for setting aside the sale on the ground of non-service of notice or irregularity.⁵³ The order of the Certificate Officer is final and not open to appeal.⁵⁴ But the order is open to review and revision.⁵⁵

The certificate-holder, the certificate-debtor, or any person whose interest is affected by the sale of any immoveable property may, within 60 days from the date of the sale or after if there are good reasons for the delay, apply to the Certificate Officer to set aside the sale on the ground of nonservice of notice under S. 7, or of a material irregularity in the certificate-proceedings or in publishing or conducting the sale, provided that the applicant has sustained substantial injury by reason of the nonservice or irregularity and that if the applicant be the certificate-debtor he deposits the amount recoverable from him or satisfies the Certificate Officer that he is not liable to pay such amount.⁵⁶

The purchaser of any immoveable property at the sale may, within 60 days from the date of the sale, apply to set aside the sale on the ground that the certificate-debtor had no saleable interest in the property sold or that the property did not exist at the time of the sale.⁵⁷

Where no application is made for setting aside the sale or where such application is made but disallowed, the Certificate Officer shall make an order confirming the sale and thereupon the sale shall become absolute.⁵⁸

The certificate-debtor may, at any time within 6 months from the service of notice upon him under S. 7, or from the date of the final order, original or appellate, passed on his petition denying liability, bring a suit in the Civil Court to have the certificate cancelled or modified or for any further consequential relief to which he may be entitled. But no such suit shall be entertained (*a*) if the certificate-debtor has omitted to state in his petition denying liability, if any, the ground upon which he claims to have the certificate cancelled or modified and cannot satisfy the Court that there was good reason for such omission and (*b*) if the certificate

LECTURE X.

*ii. Non-service of notice or irregularity.**iii. Non-transferable interest.**Confirmation of sale.**Suit to have the certificate cancelled or modified.*

53. S. 22 P. D. R. Act III (B. C.) of 1913; see Bepin Behary v. Sosi Bhulan 18 C. L. J. 628.

54. S. 51 pro. P. D. R. Act III (B.C.) of 1913.

55. Matangini v. Girish Chunder 30 Cal. 619; 7 C. W. N. 433; but see

Pryag v. Joy Narain 22 Cal. 419.

56. S. 23 P. D. R. Act III (B. C.) of 1913.

57. S. 24 P. D. R. Act III (B. C.) of 1913

58. S. 25 P. D. R. Act III (B. C.) of 1913.

LECTURE X.

be for arrears of Government revenue, unless the amount due under the certificate has been paid to the Certificate Officer within 30 days from the date of service of notice, or of the determination of the petition, or the decision of the appeal.⁵⁹

The legal disability of the plaintiff to institute the suit will not suspend the period of limitation from running, as Ss. 6-9 of the Limitation Act IX of 1908 do not apply.⁶⁰ When a suit has been brought for a declaration that a certificate has not been duly made, the period of limitation prescribed under the section has no application.⁶¹ The period of limitation will run, if the certificate and notice are valid. But the mere fact that a greater sum is claimed than is in fact due, does not make the certificate and notice bad.⁶² The determination of petition of objection need not necessarily be upon evidence given; it is enough if the petition is disallowed.⁶³

No certificate shall be cancelled by a Civil Court except on the ground that (a) the amount stated in the certificate was paid before the signing of the certificate or was not due by the certificate or (b) that the proceeding of the Collector or a public officer imposing fines adjudging costs, charges, expenses, damages &c. was not in substantial conformity with the provisions of law and that in consequence the certificate-debtor suffered substantial injury from some error, defect or irregularity in such proceeding. Nor, will a certificate be modified except on the grounds (1) that a portion of the debt was never due or that the certificate-debtor has not received credit for any portion which he has paid. But nothing will interfere with the ordinary original jurisdiction of the High Court at Fort William in Bengal or with the jurisdiction of the Calcutta Court of Small Causes.⁶⁴ But no sale shall be set aside, unless the purchaser has been made a party to the suit and until a direction is made for the refund of the purchase-money with such interest (if any) as the Court may allow.⁶⁵

Suit to set aside a voidable sale.

A sale of immoveable property held without service of notice under S. 7 is not absolutely void but the plaintiff is entitled to

59. S. 34 P. D. R. Act III (B. C.) of 1913.

64; 10 C. W. N. 130; 1 C. L. J. 538.

63. Atubika Prosad v. Gopal Buksh

60. S. 56 P.D.R. Act III (B.C.) of 1913.

1 C. L. J. 550.

61. Nagendrabala v. Sec. of State 14 C. L. J. 83.

64. S. 35 P. D. R. Act III (B. C.) of 1913.

62. Umed Ali v. Raj Laksmi 33 Cal.

65. S. 34 pro. P. D. R. Act III (B. C.)

recover possession or to set aside the sale on the ground that such notice has not been served and that he has sustained substantial injury by reason of the irregularity, provided the suit is instituted within one year from the date of delivery of possession of property to the purchaser and that he has not appeared in the certificate proceeding or applied for setting aside the sale on making the deposit under S. 22, or on the ground of non-service of notice, or irregularity under S. 23.⁶⁸ So, the effect of the omission to bring on the record the legal representatives of the judgment-debtor who died after attachment but before sale amounts to a mere irregularity and does not make the sale void but only voidable.⁶⁹

An appeal to the Commissioner is not the only remedy open to the certificate-debtor for setting aside a sale and there is no bar to his bringing a suit in the Civil Court to set aside the sale on the ground that the sale was vitiated by material irregularity leading to substantial injury.⁷⁰ Such a suit is maintainable even if the sale has become absolute.⁷¹ The certificate of sale cannot be conclusive evidence that the certificate was duly issued in accordance with the law.⁷² But the suit is barred if the plaintiff fails to prove that he has sustained substantial injury by reason of the irregularity.⁷³

A suit for setting aside a sale in execution of a certificate must be brought within one year from the date when the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought.⁷⁴ The mere fact that the plaintiff preferred an appeal to the Commissioner would not deprive him of the full period of limitation.⁷⁵ But a suit to set aside a sale or to recover possession of the property sold on the ground that no notice under S. 7 was served must be brought within one year from the date on which possession of the property

of 1913.

66. S. 36 P. D. R. Act III (B. C.)
of 1913.

67. Bepin Behary v. Sosi Bhusan 18
C. L. J. 628.

68. Sadhu Saran v. Panchdeo 14
Cal. 1; Troylukho Nath v. Pahar Khan
23 Cal. 641, overruled by Ram Taruck
v. Dilwur Ali 29 Cal. 73; 5 C. W. N.
521 (F. B.); Chunder Kumar v. Sec. of
State 27 C. d. 698; 4 C. W. N. 586;
Gopal Das v. Hardeo Das 5 C. W. N. 86;
Ramrup v. Khushal 6 C. W. N. 630;
Janki Das v. Ram Golam 28 Cal. 813;

6 C. W. N. 331.

69. Janki Das v. Ram Golam 28 Cal.
813; 6 C. W. N. 331.

70. Bishambher v. Bonomati 26 Cal.
414; 3 C. W. N. 233 (F. B.); Uzirali
v. Kartick 2 C. W. N. 363.

71. S. 36 P. D. R. Act III (B. C.)
of 1913; see Jiwan Ram v. Hari Charan
5 C. L. J. 240 (F. B.)

72. Art. 12 (e) Sch. I Limitation Act
IX of 1908.

73. Gopal Das v. Hardeo Das 5
C. W. N. 86; Baij Nath v. Ramgut Singh
23 I. A. 45; 23 Cal. .

LECTURE X. was delivered to the purchaser.⁷⁴ Under Act I (B. C.) of 1895, Art. 142 of the Limitation Act XV of 1877 applied to such a suit.⁷⁵

Void sale.

If the sale has been held without jurisdiction it cannot be rightly treated as one made under the Act and can consequently be challenged by a civil suit without recourse to the procedure laid down in the Act.⁷⁶ But it is not necessary to serve a notice to the Secretary of State under S. 80 C. P. C. Act V of 1908.⁷⁷ A sale in execution of a satisfied certificate is absolutely void.⁷⁸ In a suit to set aside a certificate the Secretary of State is a necessary party.⁷⁹ But in a suit to recover possession of property sold on the ground that the sale is void *ab initio*, the Secretary of State is not a necessary party.⁸⁰ When there was no certificate duly made, nor any notice under S. 7 served on the certificate-debtor, the sale must be set aside even though the purchaser is a third party.⁸¹

Suits barred
in certain
cases.

A suit against a certified-purchaser for a declaration that the purchase was made on behalf of the plaintiff is not maintainable.⁸²

Every question arising between the certificate-holder and the certificate-debtor or their representatives relating to the making execution, discharge or satisfaction of a certificate duly filed or relating to the confirmation or setting aside of a sale shall be determined not by suit but by order of the Certificate Officer, but a suit may be brought in a Civil Court in respect of any such question upon the ground of fraud.⁸³

74. S. 36 P.D.R. Act III (B. C.) of 1913.

75. Purna Chandra v. Dinabandhu 34 Cal. 811 ; 11 C. W. N. 756 ; 5 C. L. J. 696 ; Chunder Kumar v. Sec. of State 27 Cal. 698 ; 4 C. W. N. 586 ; Syam Lal v. Nilmony 34 Cal. 241 ; 5 C. L. J. 385 ; Saroda Charan v. Kisto Mohan 1 C. W. N. 516 ; Elokeshi v. Abinash 5 C. L. J. 638 ; Sookan Sahu v. Badri Narain 5 C. L. J. 686.

76. Janakdhari v. Gossain Lal 37 Cal. 107 ; 13 C. W. N. 710 ; 11 C. L. J. 254 ; Nandan Misser v. Harakh Narain 14 C. W. N. 607 ; 11 C. L. J. 266.

77. Raghubans v. Phool Kumari 32 Cal. 1130 ; 1 C. L. J. 542.

78. Abdul Hai v. Gajraj 20 I. A. 70 ; 20 Cal. 826 ; Gujraj v. Sec. of State 17 Cal. 414 ; Janakdhari v. Gossain Lal 37 Cal. 107 ; 13 C. W. N.

710 ; 11 C. L. J. 254 ; Nandan Misser v. Harakh Narain 14 C. W. N. 607 ; 11 C. L. J. 266.

79. Gobinda Chandra v. Hemanta Kumari 31 Cal. 159 ; 8 C. W. N. 657.

80. Raghuraj v. Maharaj 14 C. W. N. 606 ; 11 C. L. J. 385 ; Moti Lal v. Karabuddin 24 I. A. 170 ; 25 Cal. 179 ; 1 C. W. N. 639.

81. Baij Nath v. Ramgat Singh 5 C. L. J. 687.

82. S. 21 P. D. R. Act III (B. C.) of 1913 ; see Hari Charan v. Chandra Kumar 34 Cal. 787 ; 11 C. W. N. 745 ; Banga Chandra v. Tara Kinkar 16 C. W. N. 973 ; 16 C. L. J. 412 ; Girish Chandra v. Golam Karim 33 Cal. 451 ; 10 C. W. N. 347 ; 3 C. L. J. 235 ; Ambika Prosad v. Gopal Baksh 1 C. L. J. 550.

83. S. 37 P. D. R. Act III (B. C.)

LECTURE X.

In the event of a sale of immoveable property being set aside the purchaser is entitled to get back the money deposited on account of the purchase together with the penalty and interests as the Certificate Officer may allow.⁸⁴

The purchaser acquires only the right, title and interest in the property of the certificate-debtor at the time of the sale even though the property itself be specified.⁸⁵ When a certificate has been made in the name of the recorded tenant the sale does not affect the interests of the other joint tenants.⁸⁶

A sale to recover the public demands which are a first charge on the land and which may be enforced by a suit under S. 67 T. P. Act IV of 1882, if enforced by the certificate procedure, passes the interests of the judgment-debtor only.⁸⁷ Hence, if at the time when the sale takes place the persons named in the certificate as the judgment-debtors have no subsisting interest in the property, the purchaser acquires no title whatsoever.⁸⁸ But in areas in which Chapter XIV of the Bengal Tenancy Act VIII of 1885 is in force when a tenure or holding is sold in execution of a certificate for arrears of rent due in respect thereof, the tenure or holding shall, subject to the provisions of S. 22 of that Act, pass to the purchaser, as if the sale were effected in execution of a decree

Refund of
purchase-
money.

Purchaser
acquires the
right, title
and interest
of the certi-
ficate-debtor.

of 1913. This provision sets at rest the conflict of decisions in *Raghubans v. Phool Kumari* 32 Cal. 1130; 1 C. L. J. 542; *Sreenath v. Bishen Chandra* 2 C. L. J. 504; *Umed Ali v. Raj Lakshmi* 33 Cal. 84; 10 C. W. N. 130; 1 C. L. J. 538; *Ramrup v. Khushal* 6 C. W. N. 630; *Janki Dass v. Ram Golam* 28 Cal. 813; 6 C. W. N. 331; *Elokeshi v. Abinash* 5 C. L. J. 638.

84. S. 34, Sch. II r. 53, P. D. R. Act III (B. C.) of 1913.

85. S. 20 (1) P. D. R. Act III (B. C.) of 1913. "From and after the service of notice" in S. 10 Act I (B. C.) of 1895; see *Bepin Behary v. Sosi Bhutan* 18 C.L.J. 628; *Nanda Kumar v. Ajodhya Sahu* 16 C. W. N. 351; 14 C. L. J. 292; *Umachurn v. Ajadannissa* 12 Cal. 430; *Abdul Hai v. Gajraj* 20 I. A. 70; 20 Cal. 826; *Baij Nath v. Rangut* 23 I. A. 45; 23 Cal. 775; *Shekaat Hosain v. Sosi*

Kar 19 Cal. 783; *Rupram v. Iswar* 6 C.W.N. 302; *Mahanund v. Bani Madhub* 24 Cal. 27; *Lachmi Narain v. Nand Kishore* 29 Cal. 537; 6 C.W.N. 484; *Baikunto v. Uday Chand* 2 C.L.J. 311; *Ahsanulla v. Manjura Banoo* 30 Cal. 778; 8 C.W.N. 357; *Raja Koer v. Ganga Singh* 13 C. W. N. 750; 10 C. L. J. 201.

86. *Shekaat Hosain v. Sosi Kar* 19 Cal. 783; *Rupram v. Iswar* 6 C. W. N. 302; *Raja Koer v. Ganga Singh* 13 C. W. N. 750; 10 C. L. J. 201; *Afraj Moliah v. Kulsumannessa* 10 C. W. N. 176; 4 C. L. J. 68.

87. *Lachmi Narain v. Nand Kishore* 29 Cal. 537; 6 C. W. N. 484; *Baikunto v. Uday Chand* 2 C. L. J. 311; *Nobin Chand v. Bansenath* 21 Cal. 722; *Shekaat Hosain v. Sosi Kar* 19 Cal. 783.

88. *Rija Koer v. Ganga Singh* 13 C. W. N. 750; 10 C. L. J. 201.

LECTURE X. for arrears of rent.⁸⁹ The purchaser having power to annul an incumbrance should follow the procedure laid down in S. 167 B. T. Act VIII of 1885.⁹⁰

Disposal of
sale-proceeds.

When assets are realized in execution of a certificate, these shall be paid (a) the costs incurred by the certificate-holder (b) the amount due under the certificate (c) any other amount recoverable under the certificate-procedure and due to the certificate-holder on the day when the assets were realized ; the balance shall be paid to the certificate-debtor. If there be any dispute regarding the claim of the certificate-creditor to realize any money alleged due since the certificate, the Certificate Officer shall determine the dispute.⁹¹

89. S. 20 (3) P. D. R. Act III (B. C.) (B.C.) of 1913.

of 1913 ; see Ss. 158B, 159 B. T. Act 91. S. 26 P. D. R. Act III (B. C.) of VIII of 1885. 1913.

90. Ss. 20 (3), 62 P. D. R. Act III

LECTURE XI.

Compulsory Sales for arrears of Putni rent in Bengal.

While by the Permanent Settlement of 1793, the proprietors of estates answerable to Government for the revenue assessed on the estates were given full power to settle their lands to the tenants in a way most conducive to their interests, S. 2 Reg. XLIV of 1793 (subsequently repealed by Act XXIX of 1871) provided that no zemindars should grant pattalis to raiyats or other persons for the cultivation of lands for a term exceeding ten years and that every pattah granted in contravention of such provisions should be null and void. But notwithstanding such prohibition, tenures were created which were permanent, hereditary and alienable, though rent was not in all cases fixed for ever, there being generally inserted in the leases a condition for enhancement at customary rates, or whenever there might be a general enhancement in the district. The Maharaja of Burdwan, who had to pay a very large amount of revenue assessed on the estates settled with him, devised an easy and speedy method of realizing rent from his tenants, thus averting the inevitable ruin which would otherwise befall on him in default of making punctual payment of the Government revenue. Following the method adopted by the Government to realize the revenue permanently settled by sale of the proprietor's estates, the Maharaja created a kind of subordinate tenures known by the name, "putni taluks," that is, settled tenures to be held at a rent fixed in perpetuity by the lessee and his heirs for ever, which were as permanent as his own estates had been with the Government and subject to similar rules regarding summary sale for the punctual realization of rent permanently fixed on them as for the Government revenue fixed on the estates, for the punctual realization of revenue required the punctual realization of rent by those who had to pay the revenue.

But, although the provision of S. 2 Reg. XLI of 1793 was repealed by S. 2 Reg. V of 1812 which allowed the proprietors of lands to grant leases for any period which they might deem most convenient to themselves and their tenants and "most conducive to the improvement of their estate" and the Reg. XVIII of 1812 more distinctly declared that zemindars were at liberty to grant taluks and others leases of their lands fixing the rent in

Origin of a
putni.

LECTURE XI. perpetuity at their discretion, subject to the liability of their being dissolved on the sale of the estate for arrears of Government revenue, Reg. VIII of 1819 declared the validity of these taluks created before the passing of Reg. V of 1812 and while the rules of S. 2 Reg. XLIV of 1793 declaring the validity of tenures granted for a larger term than ten years was in full force and effect.¹ Reg. XLIV of 1793 was intended to apply to leases which might have been avoided by the grantor or his heirs during the time that the regulation was in force but which had been acted upon by both parties after the expiration of ten years and were treated and considered as in existence at the time of the passing of Reg. VIII of 1819.²

Definition.

A "putni taluk" is a tenure created by a proprietor of a permanently settled estate under direct engagement with Government, "to be held at a rent fixed in perpetuity by the lessee and his heirs for ever," stipulating, among other things, that "in case of an arrear occurring, the tenure may be brought to sale by the zemindar."³ It is transferable "by sale gift or otherwise at the discretion of the holder, as well as answerable for his personal debts and subject to the process of the Court of Judicature in the same manner as other real property."⁴ It is not liable to be forfeited for non-payment of rent, even if there be an agreement to that effect, but it is liable to be sold by public auction according to law.⁵

The putnidar is entitled to sublet the lands in a way most conducive to his interest but such subletting shall not prejudice the zemindar's right to hold the putni answerable for any arrear of his rent in the state it was granted and free from all incumbrances created by the putnidar.⁶

The very use of the word, "putni", in a lease carries with it all the incidents of such a tenure in the absence of any clear intention or stipulation to the contrary.⁷ A putni lease is not a lease for

1. S. 2 Reg. VIII of 1819.

2. Sheo Pershad v. Kally Dass 5 Cal. 543; 5 C. L. R. 138.

3. S. 1 Reg. VIII of 1819.

4. S. 3 (1) Reg. VIII of 1819.

5. S. 3 (3) Reg. VIII of 1819; Mohabut Ali v. Mahomed Faizullah 2 C. W. N. 455; Watson v. Coll. of Rajshayee 13 Moo. 160; 3 B. L. R. 48 P. C.;

12 W. R. 43 P. C.; Jotindra Mohan v.

Jarao Kunari 33 I. A. 30; 33 Cal. 140; 10 C. W. N. 201; 3 C. L. J. 7.

6. S. 3 (2) Reg. VIII of 1819.

7. Tarini Charan v. Watson 12 W. R. 413; 3 B. L. R. A. C. 437; Brindabun v. Brindabun 1 I. A. 178; 21 W. R. 324; 13 B. L. R. 408; Krishnamani v. Guru-gobind 2 Sev. 173.

agricultural purposes.⁸ Thus, where certain shares in certain mehals were granted in a permanent lease along with certain jote lands in those mehals by one instrument describing it as a putni settlement at a rent fixed in a lump, the settlement cannot be regarded as a valid putni.⁹ A putni granted by a Hindu widow or other persons having a limited or qualified interest is not void but only voidable.¹⁰ Limitation for setting aside such settlement begins to run from the time when the cause of action arises.¹¹ Mere receipt of rent does not operate as a confirmation of it.¹²

A covenant in a lease that on certain contingencies happening, the lessee should acquire a right thereto as putnidar but no time was specified within which the contingency was to happen in order to vest the right in the putnidar is void as offending the rule against perpetuities.¹³ A zemindar can, after creating a putni lease of his zemindari, again grant a putni lease of his remaining rights and create a tenure intermediate between himself and the former putnidar.¹⁴

A putnidar cannot throw up the putni at his option.¹⁵ Nor, is the zemindar bound to accept any relinquishment by the putnidar.¹⁶ Nor, can one of the several grantors of a putni get rid of the putni as to his share.¹⁷ A putnidar is entitled to abatement of rent, if the lands of the putni are taken for public purposes under the L. A. Act I of 1894,¹⁸ or if resumed as Chakran,¹⁹ or on the ground that the assets of the putni fall short of the amount stated in the lease.²⁰ A putnidar is not a proprietor within the meaning of Ss. 38 and

Rights of a putnidar.

8. Promotho Nath v. Kali Prasanna 28 Cal. 744.

9. Hayes v. Rudranund 33 Cal. 381; 3 C. L. J. 373.

10. Modhu Sudan v. Rooke 24 I. A. 164; 25 Cal. 1; 1 C. W. N. 433; Bunwari v. Mahima 4 B. L. R. App. 86; 13 W. R. 267; Motee v. Madhoosudun 1 W. R. 4; Tahboonissa v. Sham Kishore 15 W. R. 228; Prosunno v. Saroda 22 Cal. 939.

11. Bonomali v. Jagat Chandra 32 I. A. 80; 32 Cal. 669; 9 C. W. N. 673; 1 C. L. J. 319.

12. Shumboonath v. Bunwaree Lall 11 W. R. 102.

13. Anath Nath v. Keshab Chandra 14 C. W. N. 601.

14. Raj Kumar v. Probod Chander 9 C. W. N. 656; cf. Jarao Kumari v. Hanifudddin 14 C. W. N. 389.

15. Heera Lall v. Nil Moni 20 W. R. 383.

16. Judoonath v. Schoene, Kilburn & Co. 9 Cal. 671; 12 C. L. R. 313; Gobinda Nath v. Surja Kanta 26 Cal. 460.

17. Raj Chunder v. Unnoda 17 W. R. 221; Sham Chand v. Juggut Chunder 22 W. R. 50 aff. on p. 541; Mohadeb v. Cowell 15 W. R. 445.

18. Bhabani Nath v. L. A. Dy. Coll. of Bogra 7 C. W. N. 130.

19. Horo Kishen v. Joy Kisen 1 W. R. 299 (F. B.)

20. Nilmoney v. Sharoda 18 W. R. 434.

LECTURE-XI. 78 of the Land Registration Act VII (B. C.) of 1876.²¹ A contract by a zemindar to pay the poolbundi cesses payable by the putnidar under the B. E. Act II (B. C.) of 1882 is not contrary to the policy of the law, nor void for any other reason.²²

The mere fact of the parties owning interests which are not co-ordinate in degree is no bar to a partition. Hence, a partition can be effected between a zemindar and a putni.²³ Before the passing of T. P. Act IV of 1882 the doctrine of merger did not apply to lands in the muffassil. Accordingly, a zemindar could "purchase and keep on foot putni talook without the necessity of adopting the practice which followed in England of purchasing tenures in the name of a trustee to prevent the merger of them."²⁴ But a putni created since the passing of T. P. Act IV of 1882 is determined on a purchase of the same by the zemindar even at a sale for arrears of rent or in execution of a decree for money.²⁵

Chowkidari
Chakran
lands.

Under S. 41 Reg. VIII of 1793, the Chowkidari Chakran lands must be taken to have formed part of the estate settled with the zemindars ; they were annexed to the malguzari lands and declared responsible for the public revenue assessed on the zemindari in which they were included in common with all the malguzari lands therein.²⁶ Upon resumption of Chowkidari Chakran land and transfer of the same to the zemindar, the putnidar is entitled, if the land is covered by the putni lease, to bring a suit for recovery of possession and not for specific performance of the contract. The period of limitation of such a suit is governed by Art. 142 or 144 of Sch. I of the Limitation Act IX of 1908.²⁷ The putnidar is bound to pay the zemindar

21. Sukurullah v. Bama Sundari 21 Cal. 404.
22. Siba Prosad v. Rakhalnani 41 Cal. 130 ; 18 C. W. N. 86 ; 18 C. L. J. 337.
23. Hemadri Nath v. Ramani Kanta 21 Cal. 575 ; 1 C. W. N. 406 ; Radha Kanta v. Bipro Das 1 C. L. J. 40 ; Uma Sundari v. Benode Lal 34 Cal. 1026 ; Bhagwat Sahai v. Bepin Behari 37 I.A. 198 ; 37 Cal. 918 ; 12 C.L.J. 240.
24. Per Sir Barnes Beacock c. a., in Woomesh Chunder v. Rajnarain 10 W. R. 15 ; see also Savi v. Punchanun 25 W. R. 503 ; Jibanti v. Gocool 19 Cal. 760 ; Prosuno v. Jogut 3 C. L. R. 159.
25. Promotho Nath v. Kali Prasanna 28 Cal. 744 ; see also Harendra Nath v. Hari Mohan 18 C. W. N. 860.
26. Kazi Newaz v. Ram Jadu 34 Cal. 109 ; 11 C. W. N. 201 ; 5 C. L. J. 33.
27. Mukunda Deb v. Bidhu Sundar 35 Cal. 336 ; 12 C. W. N. 459 ; 7 C. L. J. 439 ; Harak Chand v. Charu Chandra 15 C. W. N. 5 ; 13 C. L. J. 102 ; cf. Ranjit Singh v. Radha Charan 34 Cal. 564 ; Kashim Sheik v. Prosuno Kumar 33 Cal. 596 ; 10 C. W. N. 598 ; Upendra Narain v. Protap Chandra 31 Cal. 703 ; 8 C. W. N. 320 ; Kazi Newaz v. Ram Jadu 34 Cal. 109 ; 11 C. W. N. 201 ; 5 C. L. J. 33 ; Ranjit Singh v. Kali Dasi 37 Cal. 57 ; 14 C. W. N. 527.

such rent for the resumed Chowkidari Chakran lands as corresponds to the proportion between the gross collections and the putni rent formerly payable by him.²⁸ The zemindar is entitled to refuse settlement, unless the putnidar agrees to the conditions as to payment of the assessment made by the Collector and a proportionate share in the profits.²⁹

A person who gets his name registered in the zemindar's sherista as the real owner of the putni is *prima facie* bound to pay the rent and cannot get off by alleging that he is a benamdar only.³⁰ But absence of such registration does not bar the plaintiff's title or his suit for declaration of his rights.³¹ The primary object of registration is to give information to the zemindar as to who is the tenant and until the formalities required by the Regulation are conformed with, the landlord is justified in looking to the registered tenant to be the person liable to him for rent and is not bound to recognise any one except the one registered in his sherista.³²

The zemindar cannot refuse to register and otherwise to give effect to an alienation of a putni including the case of a sale made in execution of a decree or judgment of Court, although he may demand his fee and substantial security from the transferee, the condition of furnishing security to the amount of half the jama or yearly rent, being understood to be one of the original liabilities of the tenure.³³ If the purchaser fail to give security and fee within one month from the date of sale, the zemindar is entitled to attach and hold possession of the tenure until the security and the fee have

Liability to pay rent.

Transfer by putnidar.

28. Hari Narain v. Mukund Lal 4 C. W. N. 814; Kazi Newag v. Ram Jadur 31 Cal. 109; 11 C. W. N. 201; 5 C. L. J. 33; Harak Chand v. Charu Chandra 15 C. W. N. 5; 13 C. L. J. 102; Rajendra Nath v. Hirra Lal 14 C. W. N. 995; Gopendra Chandra v. Taraprasanna 37 Cal. 598; 14 C. W. N. 1019.

29. Rajendra Nath v. Hirra Lal 14 C. W. N. 995; Gopendra Chandra v. Taraprasanna 37 Cal. 598; 14 C. W. N. 1019.

30. Umesh Chandra v. Khulna Loan Co. 34 Cal. 92.

31. Surendra Narain v. Gopi Sundari 32 Cal. 1031; 9 C. W. N. 824; Chunder Pershad v. Shuvadra Kumari 12 Cal. 622; Joy Krishna v. Sartomesha 15

Cal. 345; Harak Chand v. Charu Chandra 15 C. W. N. 5; 13 C. L. J. 102; Okhoy Coomar v. Mahtab Chunder 22 W. R. 299; Ganpat Singh v. Moti Chand 18 C. W. N. 103; 16 C. L. J. 301; but see Mungul Doss v. Dhunput Singh 25 W. R. 152.

32. Saibesh Chandra v. Mokunda Deb 10 C. L. J. 453; Ram Churn v. Dropo Moyee 17 W. R. 122; Raghab Chandra v. Brajanath 14 W. R. 489; 9 B.L.R. 91n; Surendronath v. Tincowry 20 Cal. 247; Matangini v. Sreenath 7 C. W. N. 552; Luckhi Narain v. Khetto Pal 20 W. R. 380; 13 B. L. R. 116.

33. S. 5 Reg. VIII of 1819.

LECTURE XI. been given. Such attachment shall be regarded as trust for the benefit and at the risk of the purchaser and the account produced by the zemindar shall be accepted as *prima facie* correct.³⁴ As the zemindar is entitled of his own authority to attach and hold possession of the tenure, a suit by him in the Civil Court for security is not maintainable.³⁵ But his right to sue the former tenant is not affected by this remedy ; he can proceed against the former tenant, although the purchaser is in possession.³⁶ But the zemindar cannot refuse to recognise the transferee when no security is demanded by him.³⁷ If the security furnished by the purchaser or transferee be not approved by the zemindar, an application may be made to the Civil Court of the District which, if satisfied with the sufficiency of the security, shall issue an injunction on the zemindar to accept it and give effect to the transfer.³⁸

When succession takes place, the person succeeding to a putni tenure has to pay the landlord's fee under S. 15 B. T. Act VIII of 1885 which by S. 195 (e) should be read as supplementing the Putni Regulation VIII of 1819.³⁹ But this payment of fee for having the name registered is not required when the putni is sold for arrears of rent under the Regulation, although the purchaser may be called on to give security.⁴⁰

Transfer of a share.

A putnidar may transfer his interest in whole or in part but the zemindar is not bound to recognize the transferee of a fractional portion. The transfer of a portion in no way affects the existence of the putni in its entirety or the rights of the zemindar,⁴¹ except with his consent which may be proved by the receipt granted by him to the transferee, containing a recital that the transferee's name is registered in the landlord's sherista as the tenant of a portion of the original putni at a rent which is a portion of the original rent.⁴² But although the zemindar is not bound to register the name of a

34. S. 7 Reg. VIII of 1819.

35. Joy Kishen v. Jaukeenath 17 W. R. 471.

36. Luckhi Narain v. Khettro Pal 13 B. L. R. 146; 20 W. R. 380; Surendronath v. Tincowri 20 Cal. 247.

37. Gobinda Sunder v. Sri Krishna 10 C. L. J. 538.

38. S. 6 Reg. VIII of 1819.

39. Gyanada Kantha v. Bromomoyi 17 Cal. 162; Durga Prosad v. Brindabun 19 Cal. 504.

40. S. 5 Reg. VIII of 1819.

41. S. 6 Reg. VIII of 1819; Aosub v. Bissheshuri 8 C. L. J. 554; Rakhal Chandra v. Umapado 18 C. W. N. 629; Sourendra Mohan v. Surnomoyi 26 Cal. 103; 3 C. W. N. 38; Judoonath v. Jadub Churn 11 W. R. 294; Bhoopatee v. Umbica 17 W. R. 169; Watson v. Coll. of Rajshahye 13 Moo. 160; 12 W. R. 43 P. C.; 3 B. L. R. 48 P. C.

42. Pyari Molun v. Gopal Paik 25 Cal. 531; 2 C. W. N. 375 (F. B.)

purchaser of a fractional portion of a putni,⁴³ the transfer is not void.⁴⁴ If the transferee of a portion of a putni is made jointly liable with the owner of the remaining portion he can obtain the excess paid by him by contribution.⁴⁵ Application for registration of name can be made at any time after the purchase ; nor, is there any period of limitation applicable to a suit for registration.⁴⁶

Putni Regulation VIII of 1819 is a statute complete in itself.⁴⁷ None of the Rent Acts—Act X of 1859, Act VIII (B.C.) of 1869, Act VIII of 1885—has touched the provisions of the Putni Regulation VIII of 1819, ammended as it was by Reg. I of 1820, Reg. VII of 1832, Act VIII of 1835 Act XXV of 1850, Act VI of 1853 and Act VIII (B.C.) of 1865. S. 195 (e) B. T. Act VIII of 1885 has expressly provided :—“ Nothing in the Act shall affect any enactment relating to putni tenures in so far as it relates to those tenures,”⁴⁸ The zemindar has under the ordinary law a right to bring the putni taluk to sale for arrears of rent and the rights of the purchaser to avoid incumbrances and to get other reliefs are regulated by the Rent law in force for the time being.⁴⁹ But where a right of selling or bringing to sale for an arrear of rent has been “ specially reserved by stipulation in the engagements interchanged on the creation of the tenure,” although the stipulation for sale may have been restricted in regard to time, as at the end of the year, or where the right of causing such sale under any summary process authorized by law has been acquired, the zemindar whose name is registered under the L. R. Act VII (B. C.) of 1876, has the additional right of bringing the tenure to sale twice every year for arrears of rent on the 1st of Jyte and the 1st of Aughran respectively.⁵⁰ For this purpose the zemindar may present a petition to the Collector on the 1st Bysakh and 1st Kartick respectively every year containing a specification of any balances due to him on account of

Periodical sales.

43. S. 6 Reg. VIII of 1819.

18 C. W. N. 747.

44. Bhoopatee v. Umbica 17 W. R. 169.

48. Gyanoda Kanthro v. Bromomoyee 17 Cal. 162 ; Kristo v. Kristo 16 Cal.

45. Sourendra Mohan v. Surnomoyi 26 Cal. 103 ; 3 C. W. N. 38.

642 ; Mahomed Abbas v. Brojo Sundari 18 Cal. 360 (F. B.) ; Durga Prosad v.

46. Govind Chunder v. Rungun-

Brindaban 19 Cal. 504.

money 6 Cal. 60 ; 6 C. L. R. 345 ; in re Ishan Chunder 6 Cal. 707 ; 8 C. L. R.

178 ; 21 W. R. 324 ; 13 B. L. R. 408.

52.

50. S. 8 (1) Reg. VIII of 1819 ; S. 2

Reg. I of 1820.

LECTURE XI. the expired year in the former case and of the current year up to the end of the month of Assin in the latter case.⁵¹ In a district where the Fasli or Amli year prevails the selling at the beginning and middle of the year is permissible.⁵² Proceedings for the realization of arrears of putni rent to bring the estate to sale are more analogous to the remedy by distress than to a sale ; they are not taken against persons at all but against the tenure itself.⁵³

Strict compliance with formalities necessary.

The power of sale given to a zemindar under the Regulation in case of default of rent of a putni is subject to important conditions the fulfilment of which is of the utmost consequence, not only to the person having a right to the taluk but also to all those who have rights under him. Hence, all the formalities required by Reg. VIII of 1819 enacted for a certain and defined policy must be strictly complied with before a summary sale by auction of a putni can be proceeded with.⁵⁴ But the omission though it renders the sale liable to be reversed does not render it a nullity.⁵⁵

The presentation of the petition to the Collector on the first of Bysakh or Kartick containing a specification of the balance of rent due is not a substantial portion of the process to be observed by the zemindar previous to sale, as no injury could result to the putnidar or any one holding under him by the non-presentation of the petition which is only the method prescribed by the Regulation for putting the executive machinery in force. It may be presented on the second day of either of the months when the first happens to be a Sunday.⁵⁶ The application shall be stuck up in some conspicuous part of the entchery with a notice that if the whole amount claimed in the former case and three fourths of the amount claimed in the latter be not paid on the first date of the following Jyte and Aughun respectively, the tenure shall be sold by public auction.⁵⁷ The zemindar is quite right in setting out in his petition and notices the name of the putni and the name of the putnidar as recorded in his books.⁵⁸ But notice not containing any order as to the lots

51. S. 8 (2) (3) Reg. VIII of 1819.

W. N. 805 ; 13 C. L. J. 404.

52. Pitamber v. Damoodur 21 W.R. 129.

56. Ahsanulla v. Hurri Churn 17

53. Kristo Mohun v. Aftabooddeen 15

Cal. 474, aff. 19 I. A. 191 ; 20 Cal. 86 ;

W. R. 560.

Niamat Ullah v. A. H. Forbes 2 C. W.

54. Bhugwan Chunder v. Sudler Ally

N. 459.

4 Cal. 41 ; 2 C. L. R. 357 ; Maharajah of

57. S. 8 (2), (3) Reg. VIII of 1819.

Burdwan v. Tarasundari 10 I. A. 19 ;

58. Rajnarain v. Ananta Lal 19 Cal.

9 Cal. 619 ; 13 C. L. R. 34.

703 ; Raghob Chunder v. Brajanath 14

55. Ramsona v. Naba Kumari 16 C.

W. R. 189 ; 9 C. L. R. 91n.

to be sold is not in proper form.⁵⁹ The petition need not be immediately "stuck up in some conspicuous part of the cutchery." But it is enough if it be stuck up within a reasonable time before the sale.⁶⁰

The sticking up of certified copies instead of the original petition,⁶¹ or posting it in some book which was not accessible to the public without the permission of the sheristadar,⁶² or keeping it in a bundle which was at night locked up for safe custody and in the daytime kept in a conspicuous place at the entrance of the cutchery, any person being at liberty to inspect the whole bundle,⁶³ is a material irregularity and vitiates the sale. But sticking up of the notices in the Collector's Office Board outside the Court from 10 A.M. to 5 P.M. on weekdays and not at all on Sundays is sufficient.⁶⁴ The notice is to remain stuck up till taken down at the time of sale.⁶⁵ A similar notice shall be stuck up at the sadar cutchery of the zemindar himself. A copy of the notice shall also be sent by him to be published at the cutchery or at the principal town or village upon the land of the defaulter and served by a single peon on the defaulter or his manager and in the event of inability to procure a receipt, the signatures shall be taken of three "substantial persons" residing in the neighbourhood in proof of the notice having been published on the spot. If the people of the village refuse to sign their names, the peon shall go to the Munsiff's Court or to the nearest thana and having sworn that the notice has been duly published, get a certificate to that effect from the officer. If the notice has been published at any time previous to the fifteenth of the month of Bysakh or Kartick it shall warrant the sale on the first of Jyoti or Aughun or if it be a Sunday then the next subsequent day, not being a holiday.⁶⁶

The zemindar who initiates proceeding is exclusively responsible for the observance of the forms prescribed for the publication of the notice. In every suit brought to contest the legality of the sale, the

Notice.

Onus upon
the zemindar
to prove com-
pliance with
formalities.

59. Bijoy Chand v. Atulya Charan 32 Cal. 953; 3 C. L. J. 46.

60. Niamat Ullah v. A. H. Forbes 2 C. W. N. 459; Ahsanulla v. Hurri Churn 17 Cal. 474, aff. 19 I. A. 191; 20 Cal. 86.

61. Bijoy Chand v. Atulya Charan 32 Cal. 953; 3 C. L. J. 46.

62. Balkantha Nath v. Mahatab Chand 17 W. R. 447; 9 B. L. R. 87.

63. Rajnarain v. Ananta Lal 19 Cal. 703.

64. Sachi Nandan v. Bejoy Chand 11 C. W. N. 729.

65. S. 10 Reg. VIII of 1819; see Bijoy Chand v. Atulya Charan 32 Cal. 953; 3 C. L. J. 46.

66. S. 8 (2) Reg. VIII of 1819; Surnomoyi v. Grish Chunder 18 Cal. 363 (F. B.)

LECTURE XI. onus is on the zemindar to prove the due observance of all the formalities as to the publication of notice, even if no proof is given in support of the plea of its nonservice.⁶⁷ But when the dispute is only as to whether the statutory mode of proof of such publication was resorted to, the zemindar is not to make out that the mode in which such publication is required to be proved was observed.⁶⁸

There is no analogy between the case of a sale of a putni and that for arrears of revenue ; in the former case the burden of proving due publication is entirely on the zemindar but in the latter the burden of proving irregularity is on the party who impeaches the sale.⁶⁹ The object of a notice of sale for arrears of rent is not merely to give information to the parties wishing to buy but to the defaulter that unless the arrear be paid by a certain day the property will be sold and also to the undertenants, mortgagees and other incumbrancers on the taluk to enable them to preserve their own rights.⁷⁰ The object would be frustrated, if it were sufficient to publish the notice at a distant cutchery, or serve it personally on the defaulter. Accordingly, if there is a cutchery on the land of the defaulting putnidar, i.e., the land which is to be sold for arrears of rent, the copy or extract of such part of the notice of sale as may apply to the tenure in question must be published in the cutchery, and if there is no such cutchery on the land held by the defaulter, the copy or extract must be published at the principal town or village in the land.⁷¹ But the object is attained if the notice having been placed for a time on the cutchery of the defaulter and then served on him personally.⁷² The house where the gomasta resides,

67. Sona Beebee v. Lall Chand 9 W.R. 242; Doorga Churn v. Najunoodeen 21 W.R. 397; Maharajah of Burdwan v. Tarasundari 10 I.A. 19; 9 Cal. 619; 13 C.L.R. 34; Maharauni of Burdwan v. Krishna Kamini 14 I.A. 30; 14 Cal. 365; Bejoy Chand v. Amrita Lall 27 Cal. 308; Mohesh Narain v. Krishnunud 9 Moo. 324; 5 W.R. 7 P.C.

68. Bejoy Chand v. Amrita Lall 27 Cal. 308; Maharaja of Burdwan v. Tarasundari 10 I.A. 19; 9 Cal. 619; 13 C.L.R. 34; Maharani of Burdwan v. Kristo Kamini 14 I.A. 30; 14 Cal. 365.

69. Sheorutton v. Net Loll 30 Cal. 1; 6 C.W.N. 688.

70. Surnomoyi v. Grish Chunder 18 Cal. 363 (F.B.); Gouree Lall v. Joodhisteer 1 Cal. 359; 25 W.R. 141; Raghab Chandra v. Brajanath 14 W.R. 489; 9 B.L.R. 91n.

71. Maharani of Burdwan v. Krishna Kamini 14 I.A. 30; 14 Cal. 365, affg. Maharaja of Burdwan v. Kristo Kamini 9 Cal. 931 (F.B.); 13 C.L.R. 427; Mahomed Zamir v. Abdul 12 Cal. 67; Ahsanulla v. Hurri Churn 17 Cal. 474, aff. 19 I.A. 191; 20 Cal. 86.

72. Gouree Lall v. Joodhisteer 1 Cal. 359; 25 W.R. 141.

or where all the business of the defaulting putni is carried on, may fairly be regarded as the cutchery for the time being.⁷³ Where for a mid-year sale, notice was issued intimating that the payment of the whole arrear and not the three fourths of the balance would be the only way to stay the sale, the notice was bad and defective.⁷⁴

The due publication of notice should not be left a matter of controversy but the evidence of such service should be secured immediately and exist in writing and be referred to by the proper officer as a part of the foundation of the sale.⁷⁵ The publication of the notice on the spot may be proved by the signatures of three "substantial persons" residing in the neighbourhood, *i.e.*, respectable persons of good character who are treated with consideration,⁷⁶ or by a certificate from the nearest munsiff or police officer that the serving peon swore to the service of notice.⁷⁷

The plea of non-service of notice or any informality in the publication may be taken at any stage of the suit, even for the first time in appeal.⁷⁸ But the plea must be one of substance and not merely one of form. Thus, if one of the witnesses to the notice (which was in fact served) turns out not to be "substantial,"⁷⁹ or if the receipt was not obtained, or if the notification was published on the 15th of Bysakh,⁸⁰ or if notices in the Collector's Office Board outside the Court were stuck up from 10 A.M. to 5 P.M. only on week days and not at all on Sundays,⁸¹ the plea is not good.

The sale cannot be stayed even if the zemindar gives his consent. The law is imperative on this point. But to save an under-tenure from the ruin that must attend such a sale by reason of non-

Stay of sale:-
payment
by under-
tenant.

73. Mahomed Zumir v. Abdul Hakim 12 C. L. 67; Maharaja of Burdwan v. Tarasundari 10 I. A. 19; 9 Cal. 619; 13 C. L. R. 34; Maharani of Burdwan v. Krishna Kamini 9 Cal. 931 (F. B.); 13 C. L. R. 427, aff. 14 I. A. 20; 14 C. L. 365; Hunooman v. Bipro Churn 20 W. R. 132; Mungazee v. Shibo Soonduree 21 W. R. 339.

74. Ahsanulla v. Hurri Churn 17 Cal. 474, aff. 19 I. A. 191; 20 Cal. 86.

75. Maharaja of Burdwan v. Tarasundari 10 I. A. 19; 9 Cal. 619; 13 C. L. R. 34.

76. Ram Sabuk v. Monmohini 2 I. A.

71; 23 W. R. 113; 14 B. L. R. 394; Pitamber v. Damoodur 24 W. R. 129; Gopul Kishore v. Mu lun Mohan 2 W. R. 188.

77. Ahsanulla v. Hurri Churn 17 Cal. 474, aff. 19 I. A. 191; 20 Cal. 86.

78. Sheorutton v. Net Loll 30 Cal. 1; 6 C. W. N. 688; Hurro Doyal v. Mohamed Gazi 19 Cal. 699.

79. Ram Sabuk v. Monmohini 2 I. A. 71; 23 W. R. 113; 14 B. L. R. 394.

80. Matungee Churn v. Moorary Mohun 1 Cal. 175; 24 W. R. 453.

81. Sachi Nandan v. Bejoy Chand 11 C. W. N. 729.

LECTURE XI. payment of the arrears of rent by the putnidar, any undertenant may stay the sale by paying the amount of the balance that may be due on or before the lot has been called up for sale.⁸² Payment into Court or payment to the zemindar is immaterial; staying of the sale is the essential matter.⁸³ Where the zemindar was aware of the deposit of rent though no notice was given to him the sale was held to be bad.⁸⁴ A person making payment to stay the sale must have recognized rights in the putni.⁸⁵ But the undertenant's name need not be registered in the zemindar's sherista to give him this right.⁸⁶ The tender to stop a sale must be the whole amount due and without any condition as to its being kept in deposit by the Collector as a stake-holder to determine by a summary investigation to prove whether the rent is demandable.⁸⁷

His rights.

The amount paid by the undertenant shall be deducted from any claim of rent that may be due at the time from him to the holder of the tenure advertised for sale.⁸⁸ But if the undertenant has already paid the whole rent due from himself so that the amount paid is an advance from private funds, such payment shall not be set off against future demands for rent but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means and the taluk so preserved shall be the security to the person making the advance who shall be considered to have a lien thereupon in the same manner, as if the loan had been made upon a mortgage of the tenure; and he shall be entitled on application made to the Collector to obtain immediate possession of the tenure of the defaulter in order to recover the amount so advanced from any profits belonging thereto.⁸⁹ A zemindar who after selling his zemindari sues and obtains a decree for arrears of rent accrued, due before the sale, is not entitled to the first charge which prevails against the lien of a darputnidar under S. 13 (4) Reg. VIII of 1819.⁹⁰

82. S. 13 (2) Reg. VIII of 1819.

87. Ram Churn v. Dups Moyee 17

83. Tariny Debee v. Shamra Churn

W. R. 122.

8 Cal. 954.

88. S. 13 (3) Reg. VIII of 1819.

84. Tara Soonduree v. Radha Sundur

89. S. 13 (4) Reg. VIII of 1819;

24 W. R. 63; Subesh Chandra v.

Jakhmull v. Sarodi Prasad 17 C. L. J.

Mokunda Deb 10 C. L. J. 453.

604.

85. Kristo v. Mackintosh W. R.

90. A. H. Forbes v. Maharaj Bahadur

(1864) 53.

18 C. W. N. 747, reversing Moharaj

86. Khettrur v. Luckhee 15 W. R.

Bahadur v. A. H. Forbes 35 Cal. 737;

125; Luckhi Narain v. Khettrur Pal

7 C. L. J. 652.

13 B. L. R. 146; 20 W. R. 380.

The undertenant's possession is that of a usufructuary mortgagee remaining in possession till the amount advanced is paid off by the profits of the putni and a purchaser at a sale in execution of a decree against the putnidar is not entitled to enforce his assignment by operation of law without discharging the incumbrance created by law before such assignment.⁹¹ But a person who enters into possession of a tenure as mortgagee by operation of law is bound in the first place to pay the rent due to the landlord out of the collections before applying the same to the liquidation of his own debt and the defaulter is not liable for the rents of tenure during the period of the possession by the person so holding it as mortgagee.⁹² The undertenant who has come into possession of the tenure and is entitled to the profits of it is bound to give notice of his title to the raiyats. In the absence of such notice he cannot recover from them rents already paid by them to the putnidar.⁹³ Where a darputnidar falsely alleged that no rent was due, he cannot claim to set off any portion of the amount in a suit for rent by the putnidar.⁹⁴ The undertenant's possession of the putni after his lien on it is extinguished by satisfaction of the debt from the profits of the tenure is an adverse possession.⁹⁵ The undertenant is not bound to apply to the Collector for immediate possession of the tenure but is competent to sue for the recovery of the amount in the ordinary way without making any such application.⁹⁶ Any payment made by an undertenant on account of subsequent rent is not a charge under S. 13 (4) Reg. VIII of 1819, nor under S. 65 B. T. Act VIII of 1885; nor, is it a claim arising under S. 69 I. C. Act IX of 1872.⁹⁷

The talukdar may contest the zemindar's demand of any arrear as specified in the notice advertised and apply for a summary investigation at any time within the period of notice; thereupon the

Contesting
the right to
sell.

91. Nabo Gopal v. Srinath 8 Cal. 877 ; 11 C. L. R. 37 ; Boistub Churn v. Tara Chand 11 W. R. 357 ; Lalit Mohun v. Srinibas 13 Cal. 331 ; 11 C. L. R. 37.

92. Bharub Chandra v. Lalit Mohun 12 Cal. 185 ; Kannaye Lall v. Nistorin 10 Cal. 443 ; Ramjiban v. Tazuddin 15 C. W. N. 404.

93. Nil Monee v. Hills 4 W. R. (Act X) 38.

94. Kamalanand v. Jarao Kumari 17 C. L. J. 96.

95. Kanti Chunder v. Baman Doss 25 W. R. 434 ; Jakhomull v. Saroda Prasad 7 C. L. J. 604.

96. Umbika v. Pranhuree 13 W. R. 1 (F. B.) ; 4 B. L. R. 77 (F. B.) ; Luckhi Narain v. Khettro Pal 20 W. R. 380 ; 13 B. L. R. 146 ; Lalit Mohun v. Srinibas 13 Cal. 331 ; 11 C. L. R. 37 ; Nobo Gopal v. Srinath 8 Cal. 877 ; 11 C. L. R. 37.

97. Ramjiban v. Tazuddin 15 C. W. N. 404.

LECTURE XI. zemindar shall be called upon to furnish his kabuliat and other proofs in order that an award may be made before the day appointed for sale. But if no award be made before the date of sale, or if a suit brought by any party contesting the right of the zemindar to make the sale be still pending and the zemindar insists on the demand, the sale shall be made on his responsibility, unless the amount claimed be deposited by the talukdar contesting the demand.⁹⁸ The summary enquiry must be made within the period of notice, *i.e.*, 1st Jyte or 1st Aughun as the case may be.⁹⁹ The Collector may take up the points connected not only with the amount of the claim but the saleable character or otherwise of the tenure. A pntnidar who contests the arrear may deposit the amount claimed after the lot has been called up for sale. But the zemindar can decline to accept the tender of payment made by an unregistered transferee and if he insist on, the Collector has no option to stay the sale but is bound to proceeed with it.¹⁰⁰

Mode of conducting sale.

The sale of a putni taluk shall be made in open cutchery by the Collector of Land Revenue in whose jurisdiction, as defined by Act VI of 1853, the lands lie,¹⁰¹ to the highest bidder but not to the actual defaulter, nor his undertenants. If the fifteen per cent of the purchase-money be not paid immediately or within two hours, the lot shall be resold on the same day and if the remainder of the purchase-money be not paid by noon of the eighth day, notice of the resale on the following day, *i.e.*, the ninth day, shall be given by beat of drum and the lot shall be resold at the appointed time at the risk of the first purchaser who shall forfeit the deposit of fifteen per cent already made and be further answerable for any amount by which the proceeds of the second sale may fall short of the antecedent one. If on the date of resale the zemindar accepts the arrears from the defaulter and the putni is not put up for sale, that does not give any right to the purchaser to get a refund of the earnest money. The deficiency may be levied by the process for the execution of decrees of the Civil Court.¹⁰² Originally, putni sales used to be conducted by the Civil Courts; but such conduct was transferred by S. 16 Reg. VII of 1832 to the Revenue officer, but the words in S. 9 properly applicable, if the sale were to be conducted by the Civil Courts but somewhat meaningless when

98. S. 14 Reg. VIII of 1819.

99. Ram Churn v. Dropo Moyee

17 W. R. 122.

100. S. 14 Reg. VIII of 1819.

101. S. 3 Act VIII (B. C.) of 1865.

102. S. 9 Reg. VIII of 1819.

such conduct was transferred, were probably left in the Regulation per *incurium*.¹⁰³ Though a suit to recover the deficiency is maintainable in a Civil Court there is no reason why the same cannot be recovered without a suit.¹⁰⁴

The public officer making the sale shall not be answerable in any respect except for its fairness and publicity and for the observance of the rules prescribed for his guidance in Regulation VIII of 1819. The notice of sale stuck up in the cutchery shall be taken down and the lots called up successively in the order in which they are in it. The officer shall first examine the account papers and the receipt for, or certificate of, the notice directed to be published in the mufassil produced for each lot by the zemindar and satisfy himself that there is really a balance due for which the tenure can be legally sold under S. 8 Reg. VIII of 1819 and that the notice has been regularly served. He shall then record the observance of these formalities in a separate rubakaree to be held upon each lot sold. The zemindar is exclusively responsible for the correctness and the authenticity of the papers produced.¹⁰⁵

A putni cannot be sold in piecemeal according to the separate shares of the zemindars entitled to receive rent from the putnidar even if the whole putni be sold by separate lots on the same day.¹⁰⁶

When the balance of the purchase-money is paid on the 8th day the sale becomes final and conclusive ; the sale is *ipso facto* confirmed without any formal application by the purchaser.¹⁰⁷ The purchaser shall receive from the officer conducting the sale a certificate of such payment which need not be registered to make it admissible in evidence.¹⁰⁸ The purchaser shall then proceed with this certificate to procure a transfer to his name in the zemindar's cutchery and upon furnishing security, if so required, to the extent of half the annual rent, he shall receive the usual amuldustuk or orders for possession together with notice to the raiyats and others to pay their rent henceforward to him. The zemindar shall also furnish access to any papers connected with the tenure purchased that may be forthcoming in his cutchery but if he in any manner delay the transfer in his office or refuse to give orders for possession upon the

Forms to be observed.

Completion of sale.

103. Raghu Ram v. Mohesh Chandra
7 C. W. N. 111.

104. Raghu Ram v. Mohesh Chandra
7 C. W. N. 111.

105. S. 10 Reg. VIII of 1819.

106. Cowell v. Mohadeb 17 W. R.

182.

107. Bhuban Mohan v. Girish Narain
13 C. L. J. 339; Ramsona v. Naba
Kumari 16 C. W. N. 805; 13 C. L. J. 404.

108. Abdool Aziz v. Radha Kant
5 Cal. 226.

LECTURE XI. purchaser furnishing good and substantial security when so required, the purchaser may apply to the Civil Court and be put in possession of the lands by the nazir in the same manner as possession is obtained under a decree of Court. But if the delay be on account of the zemindar's contesting the sufficiency of the security tendered, the purchaser may apply to the Civil Court of the district which, if satisfied of the sufficiency of the security, shall issue an injunction on the zemindar to accept it and give effect to the transfer without delay.¹⁰⁹

If the zemindar withholds his amuldustak or orders for possession and disables the purchaser from collecting rents, it is inequitable to allow him to recover from the purchaser the rent which the withholding of the amuldustak has prevented his collecting.¹¹⁰ If the defaulter or the holders of tenures on assignments derived from him and intermediate between him and the actual cultivators offer opposition or interfere with the collections of the purchaser from the lands composing his purchase, the purchaser may apply to the Civil Court. A proclamation shall then issue declaring that the new incumbent having, by purchase at a sale for arrears of rent due to the zemindar, acquired the entire rights and privileges attaching to the tenure of the late talukdar in the state in which it was originally derived by him from the zemindar he alone will be recognized as entitled to make the zemindari collections in the mofussil and no payments made to any other individual will on any account be credited to the raiyats or others in any suit for rent or on any other occasion whatever when the same may be pleaded. If after the issue of such proclamation the late incumbent or his undertenants still continue to oppose the entry of the purchaser, or if there be a reason to apprehend a breach of the peace, the aid of police officers and of all other public officers shall be given to the purchaser on his presenting a written application for the same.¹¹¹

A putni sale is invalid if there was no arrear of rent at the date of sale,¹¹² or where the zemindar knows that the rent due has been paid into Court.¹¹³ But the deposit with the Collector has not the effect of payment to the zemindar.¹¹⁴ Nor, can a sale stand if the

109. S. 15 (1) Reg. VIII of 1819.

110. Bidhoonookhi v. Nilmoney I C. L. R. 164; Darimba v. Nilmoney 15 W. R. 180.

111. S. 15 (2), (3) Reg. VIII of 1819.

112. Shoop Chunder v. Perta.

Chunder 7 W. R. 218; Mobaruck Ali v. Ameer Ali 21 W. R. 252.

113. Tara Soonduree v. Radha Soondur 24 W. R. 63.

114. Krishna Mohan v. Aftabuddin

15 W. R. 560; S. B. L. R. 134.

provisions of the Reg. VIII of 1819 are not strictly complied with.¹¹⁵ But mere inadequacy of price is no ground for setting aside a sale regularly held.¹¹⁶

It is competent to any party desirous of contesting the right of the zemindar to make the sale, whether on the ground of there having been no balance due or on any other ground, to sue the zemindar, making the purchaser a party for the reversal of the sale and on establishing a sufficient plea to obtain a decree with costs and damages.¹¹⁷ Thus, an unregistered proprietor of a putni is entitled to sue to set aside a sale.¹¹⁸ The suit may be brought in any one of several Courts in whose jurisdiction the property or a part thereof is situate, although the sale was held in the Collectorate of another district.¹¹⁹ One of the defaulting co-sharers may sue to set aside the sale making the other co-sharers parties but the suit must be for setting aside the sale of the whole putni, for the Court cannot declare the sale to be good or bad in part but must decide whether it is to stand or fall for the whole tenure.¹²⁰

The limitation of suits to set aside a putni sale begins to run from the date of the confirmation of the sale, *i.e.*, the date of the payment of the full amount of the purchase-money, the period being one year under Art. 12 (*d*) Sch. I of the Limitation Act IX of 1908.¹²¹

When a putni sale is set aside the Court shall indemnify the purchaser against all loss at the charge of the zemindar or the person at whose suit the sale may have been made.¹²² He is therefore entitled to a refund of the purchase-money with interest.¹²³ He may also obtain damages and costs from the zemindar.¹²⁴ He may also

Effect of setting aside a sale.

i. Purchaser must be indemnified.

115. Bijoy Chand v. Atulya Charan 32 Cal. 953; 3 C. L. J. 46; Surnamoyee v. Grish Chunder 18 Cal. 363; Rajnarain v. Ananta Lal 19 Cal. 703.

116. Mungazee v. Shibo Soonduree 21 W. R. 369.

117. S. 11 Reg. VIII of 1819.

118. Rajnarain v. Ananta Lal 19 Cal. 703; Joykrishna v. Sarfamesha 15 Cal. 345; Chunder Pershad v. Shuvadra Kumari 12 Cal. 622; *contra* Mungul Doss v. Dhunput Singh 25 W. R. 152.

119. Beni Madhab v. Jotindro Mohun 11 C. W. N. 765.

120. Ramsona v. Naba Kumari 16 C. W. N. 805; 13 C. L. J. 404; Ram Churn v. Dropo Moyee 17 W. R. 122;

Suresh Chandra v. Akkori Singh 20 Cal. 746; Unnoda v. Erskine 21 W. R. 68; 12 B. L. R. 370; Gangadhar v. Abdul Ajij 14 C. W. N. 128; 11 C. L. J. 31.

121. Ramsona v. Naba Kumari 16 C. W. N. 805; 13 C. L. J. 404; Bhulan Mohan v. Girish Narain 13 C. L. J. 339.

122. S. 14 Reg. VIII of 1819.

123. Mobaruck Ali v. Ameer Ali 21 W. R. 252; Bejoy Chand v. Amrita Lall 27 Cal. 308; Preo Lall v. Gyan Turunginee 13 W. R. 161; Baikantha v. Mahatab 9 B. L. R. 87; 17 W. R. 447; Khellat Chunder v. Keshub Chunder 16 W. R. 46.

124. Abdoolah v. Oomed Ali 6 W. R. 321.

LECTURE XI. compel the zemindar to indemnify him on account of all payments of rent which he may have made, or he can set up his loss in answer to a liability which he has incurred.¹²⁵ Payment of rent made by a purchaser before the sale is set aside is not a voluntary payment under S. 69 of I.C. Act IX of 1872.¹²⁶

ii. Putnidar
must be re-
stored to pos-
sessions.

Upon the sale being set aside and possession restored, the putnidar takes back the estate subject to the obligation to pay the arrears of rent which became due.¹²⁷ The zemindar is entitled to bring a suit for the arrears under the ordinary Rent law, as if no application were made under the Regulation. Limitation does not run so long as the sale is not set aside and the possession restored to the putnidar. If the zemindar himself purchases the tenure and collects rents from the tenants, the putnidar is entitled to deduct the amount realized by the zemindar from his claim of rent.¹²⁸ The putnidar is also entitled to sue the purchaser for mesne profits.¹²⁹ Limitation runs under Art. 109 Sch. I of the Limitation Act IX of 1908 from the time when the profits were actually received and not from the time when the putnidar recovered possession.¹³⁰ On a sale being set aside the former holders of undertenure get back their possession.¹³¹ If they have paid a bonus to take a fresh lease from the purchaser, they are entitled to have it refunded.¹³²

Purchase by
defaulter.

A defaulter cannot purchase a putni sold through his own default, either in his own name or in that of any other person and acquire a right to annul a darputni created by himself or his predecessor.¹³³ Not only the recorded shareholders but all actual defaulters, such as joint putnidars, are prohibited from being purchasers.¹³⁴ If the

125. Nagendra Nath v. Chandra Sekhar 5 C. L. J. 59 ; Tara Chand v. Nafar Ali 1 C. L. R. 236 ; Baikantha v. Mahatab 9 B. L. R. 87 ; 17 W. R. 447.

126. Radha Madhub v. Sasti Rau 26 Cal. 826.

127. Surno Moyee v. Shooshee Mokhee 12 Moo. 244 ; 2 B. L. R. (P. C.) 10 ; 11 W. R. (P. C.) 5.

128. Dhunput v. Saraswati 19 Cal. 267 ; Mahomed Jeaullya v. Sukheanessa 14 C. W. N. 446.

129. Amrita Sekhar v. Bejoy Chand 4 C. L. J. 547.

130. Peary Mohan v. Khelaram 35 Cal. 996 ; 13 C. W. N. 15 ; 8 C. L. J. 181 ; Dhunput v. Saraswati 19 Cal. 267 ;

Surno Moyee v. Shooshee Mokhee 12 Moo. 244 ; 2 B. L. R. (P. C.) 10 ; 11 W. R. (P. C.) 5.

131. Srinarain v. Smith 4 Cal. 807 ; 4 C. L. R. 148.

132. Tarachand v. Rani Gobind 4 Cal. 778 ; 4 C. L. R. 20.

133. S. 9 Reg. VIII of 1819; see Mirza Mahomed v. Kishen Mohun W. R. Sp. 92 ; Srinath v. Haronath 9 B. L. R. 220 ; 18 W. R. 210 ; Gouree Komul v. Raj Kishen 5 W.R. 106 ; Gouree Komul v. Raj Kristo 14 W. R. 369 ; Ram Lall v. Debender 8 Cal. 8 ; 9 C. L. R. 337 ; Kamalanand v. Jarao Kumari 17 C. L. J. 96 ; Madhub v. Joy Koomaree 5 W. R. 201.

134. Gouree Komul v. Raj Kishen

putnidar takes possession of the durputni in the name of the ostensible purchaser he is not entitled to claim rent from the durputnidar in respect of the period of eviction.¹³⁵ A contract entered into by a putnidar with a stranger stipulating that the latter would purchase the putni and reconvey it to the putnidar receiving some profit is invalid under S. 23 I.C. Act IX of 1872, as being in contravention of S. 9 Reg. VIII of 1819.¹³⁶ A bemani purchase by one of the defaulters is not absolutely void ; it is valid as against the zemindar but creates no title as against the other cosharers; the property will remain in the purchaser until the sale is avoided; the parties are exactly in the same position as before the sale, the defaulter purchaser being treated as having made the purchase on account of, and as a trustee for, his cosharers.¹³⁷

A putni sale gives the purchaser what may be called a " parliamentary title " ; he acquires the right to take possession immediately.¹³⁸ The sale *prima facie* destroys all incumbrances¹³⁹; the purchaser is entitled to have possession of the tenure in the same state as it stood at its creation by the zemindar free from all incumbrances created on it actively or passively, unless the right of making such incumbrances shall have been expressly vested by a stipulation in the written engagement under which the tenure may have been held ; and no transfer or assignment or underleases creative of a middle interest between the resident cultivators and the late proprietor made without the zemindar's express authority shall bar him to hold the tenure answerable in the state in which he created it for the rent.¹⁴⁰ If the putni is sold in different shares and not in its entirety, the purchaser, although he purchases all the shares on one and the same day, cannot be regarded as a purchaser of the entire putni ; nor, can he get it free from all incumbrances.¹⁴¹

Rights of the
purchaser.

5 W. R. 106.

135. Kamalanand v. Jarao Kumari 17 C. L. J. 96.

136. Mohan Lal v. Udai Narain 11 C. W. N. 1031.

137. Jotendro v. Debendro 2 C. L. R. 419; Koijash v. Kalee Prosunno 16 W. R. 80; Kishore v. Kally 20 W. R. 333; Matangini v. Prasannamoyi 3 C. L. J. 93; Harak Chand v. Charu Chandra 15 C. W. N. 5; 13 C. L. J. 102.

138. Krishna Promoda v. Dwarka Nath 17 C. W. N. 1092; 19 C. L. J. 360.

139. Brindabun v. Brindabun 1 I. A. 178; 13 B. L. R. 408; 21 W. R. 324; Watson v. Coll. of Rajshahye 13 Moo. 160; 3 B. L. R. (P. C.) 48; 12 W. R. (P. C.) 43; Krishna Promoda v. Dwarkanath 17 C. W. N. 1092; 19 C. L. J. 360.

140. S. II Reg. VIII of 1819; see Gopendro v. Mokaddam 21 Cal. 702; Krista Das v. Jotindra Nath 16 C. W. N. 561.

141. Nuffer Chandra v. Rajendra Lal 25 Cal. 167; see *contra* Monomotho Nath v. Glasco 20 W. R. 275.

LECTURE XI.
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Incumbrances

The purchaser is not privy in estate to the defaulting proprietor and he does not derive his title from him.¹⁴² Anything which restricts or limits the rights of the putnidar and interferes with his enjoyment of the putni e.g., a customary right to appropriate tree, is an incumbrance.¹⁴³ So is an adverse possession.¹⁴⁴ Incumbrances and under-tenures are not *ipso facto* avoided by the sale, until the purchaser by some overt act, such as, the institution of a suit or otherwise, indicates his intention to exercise his right of avoidance.¹⁴⁵

Incumbrances existing previous to the date of the creation of the putni are neither void nor voidable. When the purchaser proves that the lands in dispute are included within the ambit of the putni, the onus is on the defendant to prove that the lands were not held by him or his predecessor under the lease.¹⁴⁶ The validity of a putni sale cannot be impeached collaterally by way of defence in a suit by the purchaser for ejectment.¹⁴⁷ The receipt of rent for 15 years by the purchaser is a waiver on his part to evict the tenant.¹⁴⁸

The period of limitation for avoiding incumbrances and under-tenures is 12 years under Art. 121 Seh. I of the Limitation Act IX of 1908 from the date of the confirmation of sale which takes effect on the payment of entire amount of the purchase-money on the eighth day after sale.¹⁴⁹

The purchaser shall not be entitled to eject a khudkast raiyat or resident and hereditary cultivator, nor to annul any

Khudkast
raiyat.

142. Satish Chandra v. Munjamati 17 C. W. N. 340 ; Taraprasad v. Ram Nrising 6 B. L. R. App. 5 ; 14 W. R. 283 ; Radha Gobind v. Rakhal Das 12 Cal. 82.

143. Prodyote Kumar v. Gopi Krishna 37 Cal. 322 ; 14 C. W. N. 487 ; 11 C. L. J. 209.

144. Satish Chandra v. Munjamati 17 C. W. N. 340 ; Prodyote Kumar v. Gopi Krishna 37 Cal. 322 ; 14 C. W. N. 487 ; 11 C. L. J. 209 ; Nuffer Chandra v. Rajendra Lal 25 Cal. 167 ; Gobinda Nath v. Surja Kanta 26 Cal. 460 ; Karuni Khan v. Brojo Nath 22 Cal. 244 ; Harek Chand v. Bijoy Chand 9 C. W. N. 795 ; 2 C. L. J. 87 ; Khantomoni v. Bijoy Chand 19 Cal. 787 ; Woomesh Chunder v. Rajuarain 10 W. R. 15.

145. Titu Bibi v. Mohesh Chunder 9 Cal. 683 (F. B.) ; 12 C. L. R. 304 ; Satish Chandra v. Munjamati 17 C.W.N. 340.

146. Sashi Bhushan v. Mahomed Matain 4 C. L. J. 548.

147. Ramsona v. Naba Kumari 16 C. W. N. 805 ; 13 C. L. J. 404.

148. Woomanath v. Roghoo Nath 5 W. R. (Act X) 63.

149. Titu Bibi v. Mohesh Chunder 9 Cal. 683 (F. B.) ; 12 C. L. R. 304 ; Nuffer Chandra v. Rajendra Lal 25 Cal. 167 ; Harek Chand v. Bijoy Chand 9 C. W. N. 795 ; 2 C. L. J. 87 ; Satish Chandra v. Munjamati 17 C. W. N. 340 ; see *contra i.e.*, from the day of sale Brojo v. Futick 17 W. R. 407.

bona fide engagements with such tenant, unless it is proved in a regular suit that a higher rent would have been demandable at the time such engagements were contracted.¹⁵⁰ The fact that a raiyat resides in a mouzah other than that in which the land is situato does not preclude him from being treated as a resident cultivator.¹⁵¹ Nor, the fact that the resident and hereditary cultivator acquired under arrangement with the darpurnidar mirasi right gives the purchaser a right to eject him.¹⁵² The creation or growth of a right to appropriate trees, whether contractual or customary, is a *bona fide* engagement which the purchaser cannot annul.¹⁵³ If the zemindar himself purchases he is not in a better position.¹⁵⁴ The purchaser cannot recover a higher rent than his predecessor without bringing a regular suit, even if he were the grantor of the putni.¹⁵⁵ The holder of a kaimi mourashi jama on being dispossessed by the purchaser cannot maintain a suit for establishing his rights, even if the purchaser received rent from him and allowed him to occupy the lands for several years.¹⁵⁶ An occupancy or non-occupancy holding, if not held by a khudkast raiyat, is an inrembrance and not protected from ejection.¹⁵⁷

The purchaser is liable for the rent of the month in which the zemindar presented the application under S. 8 of the Regulation and cannot recover it from the defaulter.¹⁵⁸ The sale is subject to a charge on the tenure for previous arrears and a decree for such arrears has the effect of a rent decree under S. 65 B. T. Act VIII of 1855.¹⁵⁹ But the arrears that have subsequently accrued may be realized by the summary process and the purchaser

Liability of
the purchaser

150. S. 11 (3) Reg. VIII of 1819.

151. Nubokishore v. Jadub Chunder 20 W. R. 426 ; Assanoollah v. Shamshir 4 C. L. R. 165 ; Koontee v. Hridoy 16 W. R. 206.

152. Sarbananda v. Rana Gazi 18 C. L. J. 334.

153. Prodyote Kumar v. Gopi Krishna 37 Cal. 322 ; 14 C. W. N. 487 ; 11 C. L. J. 209.

154. Prodyote Kumar v. Gopi Krishna 37 Cal. 322 ; 14 C. W. N. 487 ; 11 C. L. J. 209.

155. Magaram v. Nilmonnee 21 W. R. 326 ; 13 B. L. R. 198 ; Madhusudan v. Ramdhan 3 B. L. R. 431 ; 12 W. R. 383 ; Goluckunoni v. Huro Chunder 8 W.

R. 62 ; Buzlool Rahman v. Pran Dhun 8 W.R. 222; Taraprasad v. Ram Nrising 6 B.L.R. App. 5 ; 14 W. R. 283 ; Prodyote Kumar v. Gopi Krishna 37 Cal. 322 ; 14 C. W. N. 487 ; 11 C. L. J. 209.

156. Mohini Chunder v. Jotirmoy 4 C. L. R. 422.

157. Jogeshwar v. Abed Mahomed 3 C. W. N. 13.

158. Darimba v. Nilmonee 15 W. R. 180 ; Khoda Buksh v. Digumburee W. R. (1864) 207.

159. S. 17 (3) Reg. VIII of 1819 ; Peary Mohan v. Sreeram 6 C. W. N. 794 ; Obhoy Chunder v. Nilambar W. R. (1864) 73.

LECTURE XI. cannot escape the liability by pleading that he has taken possession of the tenure after a part of the arrears has accrued.

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Disposal of
sale-pro-
ceeds.

One per cent of the sale-proceeds shall be carried to the account of the Government to meet the expenses of the establishment for carrying into effect the provisions of the Regulation.¹⁶⁰ Next, the balance on account of which the sale may have been made shall be made good in full (with interest and all charges actually incurred by the zemindar in bringing the taluk to sale) to the zemindar ; but the antecedent balance, beyond that of the current year or of that immediately expired if the sale be at the commencement of the following year, shall not be included in the demand ; such antecedent balance is a personal debt of the putnidar and must be recovered in the same way as other debts by a regular suit and not by the summary resale of the tenure under the Regulation, notwithstanding a stipulation in the putni lease that on default of any instalment of rent, the zemindar shall be entitled to realize the same by sale of the putni.¹⁶¹

The remainder of the sale-proceeds shall be held in deposit by the Collector or Assistant Collector of the district to answer the claims of all persons who by assignment of the defaulter may have a valuable interest on the tenure or on any part of it.¹⁶² A seputnidar, not being an assignee of the defaulter, is not entitled to a share of the sale-proceeds.¹⁶³ It is competent to a person having such valuable interest to institute, within two months from the date of sale, a regular suit for the price he may have paid for the same or for a compensation for the loss sustained by him in consequence of the sale, and the Court may award the claimant any amount that may be deemed just and equitable under all the circumstances. If there be more claimants and if the value assessed upon the whole claim exceed the amount in deposit, such amount should be divided proportionately and the remainder shall be a personal debt against the defaulter to be realised by the usual process for the execution of decrees.¹⁶⁴ The sale has not the effect of destroying the character

160. S. 17 (2) Reg. VIII of 1819.

804; Jagannath v. Mohiuddin 37 Cal.

161. S. 17 (3) Reg. VIII of 1819;

747.

see Sourendra Mohan v. Surnomoyi 26

162. S. 17 (4) Reg. VIII of 1819.

Cal. 103; 3 C. W. N. 38; Prangour v.

163. Moti Lal v. Bissessur 3 C. W. N.

Hemanta Kumari 12 Cal. 597; Lutcefun

60.

v. Meah Jan 6 W. R. 112; Khitish

164. S. 17 (5) Reg. VIII of 1819.

Chandra v. Khulna Loan Co. 16 C. W. N.

of a decree previously obtained as a rent decree ; such a decree has LECTURE XI.
a priority over a mortgage-decree on the surplus sale-proceeds.¹⁶⁵

The surplus sale-proceeds, though under attachment by a Civil Court in the hands of the Collector, continue to be the property of the putnidar, until ordered to be paid away by an order of such Court.¹⁶⁶ A claim against the surplus sale-proceeds can be enforced only by a regular suit within two months from the date of sale. A mere attachment in execution of a decree gives no priority.¹⁶⁷ But the rule of limitation does not apply where there is a special contract between the putnidar and the durputnidar.¹⁶⁸ The amount advanced by a mortgagee is a charge on the sale-proceeds.¹⁶⁹ But the undertenant or other possessor of an assigned interest upon the land of the tenure sold shall not be entitled to recover any compensation, unless it is proved that the whole amount of the rent payable by him for the period for which the sale was effected has been paid before the date of sale.¹⁷⁰ If any portion of the rent remains unpaid, the claim for compensation cannot be made.¹⁷¹ In case of an uncertainty as to who is the person to whom rent is due, if payment is actually made for the period for which the rent of the superior landlord was unpaid, the requirements of the law are substantially complied with.¹⁷²

If no claim is made within the period of two months by any undertenant or assignee, or if the amount claimed does not equal the entire deposit, the whole or the balance as the case may be shall be paid to the putnidar. Similarly, upon executing a decree passed in favour of any undertenants or assignees, the amount adjudged to them shall be paid to them.¹⁷³ A suit to recover the surplus sale-proceeds wrongfully taken out by a person in execution of a decree against a third party who was the former owner of the putni but who sold it to the plaintiff must be brought within 3 years from the date when the money is received under Art. 62, or 120, Sch. I of the

165. Basant Kumar v. Khulna Loan Co. 20 C. L. J. 1.

sonno 4 Cal. 539 ; 6 C. L. R. 28 ; Gosto Behary v. Sib Nath 20 Cal. 241.

166. Saefullah v. Luchmeeput 13 W. R. 58.

170. S. 17 (6) Reg. VIII of 1819 ; Madhub v. Joy Kumaree 5 W. R. 201 ; Moti Lal v. Bissessur 3 C. W. N. 60.

167. Surnomoyee v. Land Mortgage Bank 7 Cal. 173 ; 8 C. L. R. 341.

171. Surnomoyee v. Land Mortgage Bank 7 Cal. 173 ; 8 C. L. R. 341.

168. Jadoo Nath v. Nobo Kishen 4 W. R. 66 ; Joy Kishen v. Jadoo Nath 3 W. R. 2.

172. Soorjo Koomari v. Digamburee 21 W. R. 219.

169. Mohesh Chunder v. Ram Pro-

173. S. 17 (7) Reg. VIII of 1819.

LECTURE XI.

Limitation Act IX of 1908.¹⁷⁴ Any person interested in a deposit may withdraw the whole or any part thereof on substituting Government securities.¹⁷⁵

174. Lakshmi Priya v. Rama Kanta
30 Cal. 440 ; 7 C. W. N. 520.

175. S. 17 (8) Reg. VIII of 1819.

LECTURE XII.

Compulsory Sales by Distress.

§ 1. DISTRESS FOR FINES AND PENALTIES.

When an offender is sentenced to pay a fine, the Court passing the sentence may issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence directs imprisonment in default of fine.¹ The fine may be levied at any time within 6 years after the passing of the sentence and if the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would after his death be legally liable for his debts.² Imprisonment and distress may be simultaneously ordered.³ But the liability to pay fine does not cease when imprisonment is undergone in default.⁴ Any money (other than a fine) payable by virtue of any order passed under Cr. P. C. Act V of 1898 is recoverable as if it were a fine.⁵ Fine can also be recovered by sale of immoveable property of a deceased offender.⁶

Where a bond, taken for the appearance of a person before a Court or for any other reason, has been forfeited and if sufficient cause is not shewn why the penalty should not be paid, the Court may recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead.⁷ The order of the Magistrate is open to appeal and revision.⁸

A public servant having any duty to perform in connection with the sale of any property shall not purchase or bid for the property.⁹

§ 2. DISTRESS FOR CONTEMPT OF COURT.

Contempt primarily signifies disrespect to what is entitled to regard. In its origin, legal contempt consists in an offence more or

Recovery of fine.

Recovery of penalty.

What is contempt of Court ?

1. S. 386 Cr. P. C. Act V of 1898.

Cr. 61.

2. S. 70 I. P. C.

5. S. 517 Cr. P. C. Act V of 1898.

3. Queen v. Modoo Soodun 3 W. R. Cr. 61; Queen v. Jungli Beldar 8 B. L. R. App. 49; Pargay Rai v. Anju Mian 22 Cal. 139.

6. S. 70 I. P. C.; see Queen-Empress v. Sita Nath 20 Cal. 478.

4. Queen v. Modoo Soodun 3 W. R.

7. S. 514 Cr. P. C. Act V of 1898.

8. S. 515 Cr. P. C. Act V of 1898.

9. S. 560 Cr. P. C. Act V of 1898.

LECTURE XII. less directed against the Sovereign as the fountain-head of law and justice. Contempt of Court is so manifold in its aspect that it is difficult to lay down any exact definition of the offence. Any conduct tending to bring the authority and administration of the law into disrespect, such as (1) insult or resistance to the persons of the judges or powers of the Court, or (2) disobedience to, or neglect of, the order of the Court, or (3) interferences with the possession of a receiver, manager of a business, liquidator, receiver, or trustee in bankruptcy, sheriff after he has seized under a writ of execution, all of whom have been appointed by, and are therefore officers of, the Court is a contempt. Contempt of Court is punished not for the purpose of vindicating the dignity of the Court or of its officer but to prevent undue interference with the administration of justice.

Disobedience
to Court's
order.

Wilful disobedience to a judgment or order requiring a person to do any act other than the payment of money or to abstain from doing any thing is a contempt of Court. The fact that the order ought not to have been made is not a sufficient excuse for disobedience. The party aggrieved should apply to the Court for relief. The breach of an undertaking given to the Court by a person or corporation pending proceedings on the faith of which the Court sanctions a particular course of action or inaction is a misconduct amounting to contempt. Attachment and committal are summary processes for punishing contempts and also modes of execution for enforcing judgments and orders.

(a) Delivery
of specific
moveable.

Thus, a decree for specific moveable property may be executed by attachment of the judgment-debtor's property and if the judgment-debtor has not obeyed the decree, the attached property may, on the expiration of 6 months from attachment, be sold and out of the sale-proceeds shall be given to the decree-holder such amount as may have been fixed by the decree, to be paid as an alternative to delivery of moveable property and in other cases such compensation as the Court thinks fit.¹⁰ But the property cannot be attached, if it is not in the possession of the judgment-debtor.¹¹

(b) Specific
performance.

Again, when a decree has been passed for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction and the judgment-debtor having had an opportunity of obeying the decree has wilfully failed to obey it, or when a decree has been

10. O. 21, r. 31 C. P. C. Act V of 1908.

11. Pudmanand v. Chundi Dat 1 C. W. N. 170.

passed against a corporation for specific performance or for an injunction, the decree may be executed by attachment of the property of the judgment-debtor or of the corporation and if within one year the order has not been obeyed, the attached property may be sold and out of the sale-proceeds the Court may award to the decree-holder such compensation as it thinks fit.¹² If the party had the opportunity and has wilfully failed to obey the decree, the Court may order execution without serving a notice upon the party.¹³ The dismissal of an application to enforce the decree on the ground that the judgment-debtor did not wilfully disobey the decree is no bar to a fresh application when the judgment-debtor had the opportunity but wilfully disobeyed.¹⁴ The decree may be enforced within 3 years from each successive breach.¹⁵

An injunction must be implicitly observed to the very letter. Thus, when in any suit either before or after judgment a temporary injunction has been granted restraining the defendant from committing a breach of contract or other injury of any kind, the Court may, in case of disobedience or of breach of any terms of the injunction, order his property to be attached and if the disobedience or breach continues for one year, the property attached may be sold and out of the proceeds the Court may award such compensation as it thinks fit.¹⁶ But where attachment was applied for on insufficient grounds, the Court may on the application of the defendant award against the plaintiff such amount not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him.¹⁷ The defendant may at his option institute a regular suit against the plaintiff for compensation; but once an award is made, the defendant cannot sue for compensation for the same wrong, whether any compensation is awarded to him or not.¹⁸

The period of limitation for a suit for compensation for wrongful attachment is one year, under Art. 29 Sch. I of the Limitation Act IX of 1908, from the date of attachment.¹⁹

12. O. 21, r. 32 C.P.C. Act V of 1908.

28 All. 300.

13. Durga Das v. Deoraj 33 Cal. 306;

16. S. 91, O. 39, r. 2 C. P. C. Act V

10 C. W. N. 297; 3 C. L. J. 112;

of 1908.

Ajnasi Kuar v. Suraj Prasad 1 All. 501.

17. S. 95 (1) C. P. C. Act V of 1908.

14. Kishore Ban v. Dwarkanath 21
I. A. 89; 21 Cal. 784.

18. S. 95 (2) C. P. C. Act V of 1908;
see Palani v. Udayar 32 Mad. 170.

15. Venkatachallam v. Veerappa 29
Mad. 314; Bhagwandas v. Sukhdei;

19. Ram Narain v. Umrao Singh 29
All. 615.

LECTURE XII.

(d) Non-appearance in Court

Failure to attend Court under a process, if wilful, is a contempt and is punishable by attachment. When a person, to whom a summons has been issued, either to give evidence or to produce a document, fails to comply with the summons without lawful excuse or having attended departs before the suit has been disposed of, the Court may make an order for the attachment of his property not exceeding the amount of the costs of attachment and of any fine not exceeding five hundred rupees which may be imposed.²⁰

An accused person against whom a proclamation has been issued requiring him to appear at a specified time and place must, until he has surrendered, be regarded as in contempt. Non-attendance in obedience to a proclamation issued by a public servant is punishable under S. 174 I.P.C. The Court issuing a proclamation may, at any time, order the attachment of any property, moveable or immoveable belonging to the proclaimed person.²¹ An attachment may be simultaneous with proclamation.²² There seems to be some conflict of opinion whether or not the undivided interest of an absconding coparcener in the property of a joint Hindu family or the undivided property itself could be attached.²³

Sale of attached property.

The property under attachment shall be at the disposal of Government.²⁴ After attachment no title can be conferred by an attachment and sale subsequently made in execution of a money decree by a Civil Court.²⁵

When a claim is made to the property attached, the Magistrate should stay the sale to give the claimant time to establish his right.²⁶ When the property of a wrong person is attached the Government or the private prosecutor may be liable in damages.²⁷

The attached property shall not be sold until the expiration of six months from the date of the attachment, unless it is subject to speedy and natural decay, or the Court considers that the sale will be for the benefit of the owner, or that the immediate sale is otherwise expedient.²⁸ The purchaser is bound to enquire whether the

20. S. 32, O. 16, r.r. 10, 12, 13, 16, 17
C. P. C. Act V of 1908.

21. Ss. 87, 88 Cr. P. C. Act V of 1898.

22. Bhai Lal v. Emperor 29 Cal. 417; 6 C. W. N. 680.

23. Golam Abed v. Toolseeram 9 Cal.

861; 12 C. L. R. 411; Abbott v. Abbott

5 B. L. R. 382; Thania Sing v. Kalidas

5 B. L. R. 386.

24. S. 88 Cr. P. C. Act V of 1898.

25. Golam Abed v. Toolseeram 9 Cal. 861; 12 C. L. R. 411.

26. Queen-Empress v. Kundappa 20 Mad. 88; Queen-Empress v. Gasper 22 Cal. 935.

27. Sec. of State v. Jagat Mohini 28 Cal. 540; 6 C. W. N. 175.

28. S. 88 Cr. P. C. Act V of 1898.

Court has issued a statement in writing to the effect that the proclamation was duly published.²⁹ Any irregularity in the proclamation vitiates the sale.³⁰ As there is no provision for restitution, the Civil Court has jurisdiction to entertain a suit for setting aside the sale.³¹

§ 3 DISTRESS FOR RENT IN BENGAL.

Right to
distain.

Distraint is an offset of English law which was originally introduced into this country by Reg. XXII of 1793 which empowered certain specified landlords to distrain and sell the crops and products of the earth of every description, the grain, cattle and all other personal property (whether found in the house or on the premises of the defaulter or of any other person) belonging to the tenants. In S. 21 it was stated that these provisions would afford proprietors and farmers the means of realizing their rents with promptness and facility ; and that the utmost punctuality would consequently be expected from them in the payment of their revenue to Government. This continued to be the law until 1859 when the power of distraint was limited to the produce of the land on account of which the rent is due.³²

The landlord's right to distraint is founded on the principle that the rent reserved by his demise issues out of the land and he distrains by taking possession in the nature of a pledge of the crops or other products of the earth which have been grown on the holding.³³ The term product of the earth is to be construed as equivalent to that which can be gathered and stored, crops of the nature of cereal or grass or fruit crops and it does not apply to the trees from which fruit crops are gathered. Trees, shrubs and plants growing in a nursery ground cannot be distrained, for rent is a certain profit reserved or arising out of lands or tenement whereunto the lessor may have recourse to distraint.³⁴ The right of distress is essential and no payment to which such right is not necessarily incident is strictly rent. Rent must be a profit arising from the thing demised and not a part of the thing demised itself, or in other words, it must be a "reservation and not an exception."³⁵

29. Mian Jan v. Abdul 27 All. 572.

Homer (1901) 1 Ch. 673, per Farwell J.,

30. Abdullah v. Jitu 22 All. 216;

at p. 674; S. 121 B. T. Act VIII of 1885;

Mian Jan v. Abdul 27 All. 572; in re
Subbarayar 19 Mad. 3.

S. 112 R. R. Act X of 1859; S. 76 O. R.

Act XXII of 1886.

31. Mian Jan v. Abdul 27 All. 572.

34. Co. Lit. 47a, 142a.

32. Rent Law Commissioner's Report
Vol. I p. 6

35. Co. Lit. 47a. For definition of

rent see *ante* pp. 200-203,

33. See British Mutoscope &c. Co. v.

LECTURE XII.

The right of the landlord to distrain is given either by statute or by contract. The right to distrain for an arrear of rent which is not due for more than a year is given by statute ; but the power to distrain for the recovery of any sum in excess of the rent payable for the preceding agricultural year may be conferred by statute or by a written contract between the parties.³⁶ A landlord is not entitled to distrain for the rent of the current year nor for damages.³⁷

Who can
distrain ?

(1) A proprietor, *i.e.*, a person being in possession of, or any interest in, an estate or revenue-free property as owner thereof, including a farmer and lessee holding an estate or revenue-free property directly from or under the Collector, or (2) a manager, that is, a person who is appointed by the Collector, the Court of Wards or by any Civil or Criminal Court to manage the whole or any part of any estate of revenue-free property or who is in charge of it on behalf of a minor, idiot or lunatic, religious or charitable foundation may distrain provided that in Bengal his name and the extent of his interest in the land, in respect of which the arrear is due, have been registered according to the provisions of the L. R. Act VII (B. C.) of 1876.³⁸ But a landlord who has made default in payment of revenue cannot, in the event of a sale for arrears of revenue, recover by distress arrears of rent which may be due to him after the default from his raiyats.³⁹ A tenant cannot deny the right of a registered proprietor to distrain and plead payment of rent to a third person whose name is not registered.⁴⁰

Distress itself operates as a demand. It is a remedy given by the law without any reservation or provision of the party, although it may be controlled by arrangement of the parties and the landlord may deprive himself of the right by agreement or even by conduct. Thus, the landlord's right to distrain is lost by his accepting security for the arrear.⁴¹ The right to distrain is independent of, or in addition to, any other remedy to which he is entitled by law.⁴² But if

36. S. 121 B. T. Act VIII of 1885 ;
S. 113 R. R. Act X of 1859 ; S. 73 O. R.
Act XXII of 1886.

37. Sheobarat v. Nawrangdeo 28 Cal.
364.

38. 121 B. T. Act VIII of 1885 ;
S. 3 L. R. Act VII (B. C.) of 1876 ;
S. 114 R. R. Act X of 1859 ; S. 74 O. R.
Act XXII of 1886.

39. S. 55 B. L. R. S. Act XI of 1859.

40. S. 60 B. T. Act VIII of 1885 ;
see Hanuman v. Gobind Koer 1 C. W. N.
318.

41. S. 121 B. T. Act VIII of 1885 ;
S. 112 R. R. Act X of 1859 ; S. 72 O. R.
Act XXII of 1886.

42. S. 121 B. T. Act VIII of 1885.

the landlord recovers judgment for the rent, the remedy by distress is lost, since the rent is merged in the judgment.⁴³

Joint tenants join together to distrain as they hold by one title, but a distress by one on behalf of the others is good so long as none of the others expressly dissent. But where any of the joint tenants sever, the right of the others to distrain for rent which has already accrued is gone.⁴⁴

Where a demise is to joint tenants or tenants in common, a distress for the whole rent may *prima facie* be made against any one of them. But where the land is granted to tenants in common by separate demises but in undivided shares, no distress for rent owing by any one of them can be made except apparently as against him, that is, upon his own goods. No distress can be levied against a receiver appointed by the Court without the leave of the Court.⁴⁵ Nor, can a distress be levied against a company in liquidation without such leave.

An actual existing demise, express or implied, is essential provided there is a demise, the nature or duration of the tenancy is immaterial.⁴⁶ Possession and acknowledgment of tenancy are sufficient to imply a demise.⁴⁷ The right exists also where after the expiration of a previous tenancy, a tenant by the consent of both parties continues in possession under such circumstances as to warrant the inference that there is a tacit renovation of the contract of tenancy.⁴⁸ But the landlord cannot distrain after treating the tenant as a trespasser.⁴⁹ A tenancy at sufferance which is not created by demise does not authorize a distress, the only remedy being by action for use and occupation.⁵⁰ If a person is not to have the exclusive possession of the land but only a limited right of use and enjoyment, there is no right of distress.⁵¹

Rent for which a distress may be made must be rent properly so called, reserved at the time the tenancy is created. Any attempt

Against whom
distress may
be made?

Requisites
of a valid
distress:—
i. existing
demise,

ii. rent must
be certain,

43. Chancellor v. Webster (1893)

L. R. 2 C. P. 681.

9 T. L. R. 568.

48. Dougal v. McCarthy (1893)

44. S. 112 R. R. Act X of 1859;

1 Q. B. 736.

see Staveley v. Alcock (1851) 16 Q.B. 636.

49. Bridges v. Smyth (1829) 5 Bing.

45. Re Sutton (1863) 32 L. J. Ch.

410; 30 R. R. 681.

437.

50. Alford v. Vickery (1812) Car. &

46. Bridges v. Smyth (1829) 5 Bing.

M. 280; 66 R.R. 867; Jenner v. Clegg

410; 30 R. R. 681.

(1832) 1 Mood. & R. 213.

47. Daubuz v. Lavington (1881) 13

51. Provincial Bill Posting Co. v.

Q. B. D. 347; Yeoman v. Ellison (1867)

Low Moor Iron Co. (1909) 2 K. B. 341.

LECTURE XII. to alter the rent by a collateral agreement not amounting to a new demise only operates as a personal contract between the parties.⁵² The rent reserved must be certain; that is, the amount must either be certainly mentioned or be such as by reference to something else may be reduced to certainty. But the mere fact of rent being fluctuating does not make it uncertain, nor bars the right to distrain.

*iii. reserved
to the lessor,*

The rent must be reserved to the lessor and not to a stranger; rent is something paid by way of retribution for the land and therefore ought to be paid to him from whom the land passes. A landlord has no right to distrain for an arrear alleged to be due from a person who is not in possession and who did not raise the crop.⁵³ Nor, can the landlord distrain the produce of any part of the holding which the tenant has sublet with his written consent.⁵⁴

iv. in arrear.

The rent must be payable at a certain time; it makes no difference that it is payable in advance.⁵⁵ Rent should ordinarily be regarded not as accruing from day to day but as falling due only at stated times according to the contract of tenancy or the general law in the absence of such contract.⁵⁶ But distress cannot be made until after the rent is in arrear *i.e.*, until it is ascertained due and unpaid and it is not in arrear until after the sunset of the day on which it is due either under the contract or the statute and therefore there can be no distress until the day after the rent becomes due.⁵⁷ Rent payable in advance may be distrained for on the day following that fixed for payment.

If rent has been duly tendered before or at⁵⁸ the time when it falls due and the tender has been improperly refused, the rent cannot legitimately be said to be in arrear.⁵⁹ When once the right to distrain has arisen, nothing but payment of the rent will in general extinguish it. But arrears of rent due to the defaulter of a revenue-paying estate on the latest day of payment of revenue cannot, in the event of a sale, be recoverable by distraint after such date.⁶⁰

52. Smith v. Mapleback (1786) 1 Term. Rep. 411; 1 R. R. 247.

53. Mohinee Dosse v. Ram Coomar W. R. 1864, (Act X) 76.

54. S. 121 (3) B. T. Act VIII of 1885.

55. Walsh v. Lonsdale (1882) 21 Ch. D. 9.

56. S. 54 B. T. Act VIII of 1885:

Satyendra Nath v. Nilkantha 21 Cal. 383.

57. Dibb'e v. Bowater (1853) 22 L. J. Q. B. 396; S. 54 B. T. Act VIII of 1885.

58. Per Mookerjee J., in Kripa Sindhu v. Annada Sundari 35 Cal. 34; 11 C.W.N. 983; 6 C. L. J. 273.

59. S. 55 B. L. R. S. Act XI of 1859.

In Bengal a verified application may be made to the Civil Court to recover from the raiyat or under-raiyat of the land an arrear of rent by distraining, while in the possession of the cultivator, any crops or other products of the earth (*a*) standing or ungathered on the holding (*b*) which have been grown on the holding and have been reaped or gathered and are deposited on the holding or on a threshing floor or place for treading out grain or the like, whether in the fields or within a homestead.⁶⁰ Every such application shall bear a Court-fee stamp of 8 annas.⁶¹ One application should not be made for distraint for the rent of more than one holding.⁶²

When any conflict arises between the rights of a superior and of an inferior landlord to distrain the same property, the right of the superior landlord shall prevail.⁶³ An order for distraint shall prevail against an order issued by a Civil Court for the attachment or sale of the property which is the subject of the distraint but the surplus sale-proceeds shall not be paid to the owner of the property without the sanction of the Court issuing the order of attachment or sale.⁶⁴

The Court may, pending the execution of an order for distraining the produce or the rejection of the application, make an order prohibiting its removal and when an order is made at a considerable time before the produce is likely to be cut or gathered, it may make a further order prohibiting the removal of the produce pending the execution of the order for distraint.⁶⁵

Distraint prohibited.

A warrant of distress creates an implied warranty on the part of the landlord that he has the right to distrain and an implied undertaking to indemnify the bailiff against any act properly done in exercise of the authority given to him.⁶⁶ The officer appointed to distrain shall distrain the produce by taking charge of it himself, or placing some other person in charge of it in his behalf and publishing a notification of the distraint provided that produce which from its nature does not admit of being stored shall not be distrained at any time less than 21 days before the time when it would be fit for reaping or gathering.⁶⁷

By whom levied.

60. S. 121 B. T. Act VIII of 1885.

64. S. 139 B. T. Act VIII of 1885.

61. Art. 1 (*b*) para 2 Sch. II C. F. Act VII of 1870.

65. S. 123 B. T. Act VIII of 1885.

62. Sheobarat v. Naurangdeo 28 Cal.

66. Draper v. Thompson (1829) 4 C. & P. 84.

364.

67. S. 124 B. T. Act VIII of 1885;

63. S. 138 B. T. Act VIII of 1885.

S. 118 R. R. Act X of 1859.

LECTURE XII.

Seizure of
crops etc.

Demand of
the arrear.

Proclamation
of sale.

Distraint
withdrawn
on payment
i. by de-
faulter.

A seizure may be either actual or constructive.⁶⁸ Any acts indicative of an intention that antecedent steps should be treated as a distress and assumed by the parties to amount to a distress will be sufficient evidence of a seizure. Goods distrained are from the seizure regarded as being taken by a process of law and not merely by an assertion of a private right of the distrainer and the taking of them out of the custody of the distrainer before they are impounded is regarded in the light of a resistance of lawful authority.

The distraining officer shall serve personally, if practicable, on the defaulter and if he be not the owner, on the owner of the property distrained as well, a written demand for the arrears due and the costs incurred in making the constraint with an account exhibiting the grounds on which the constraint is made. If the service cannot be personally made, the officer shall affix copies of the demand and account on a conspicuous part of the outside of the house in which he usually resides.⁶⁹

A constraint shall not prevent any person from reaping, gathering or storing any produce or doing any other act necessary for its due preservation; and on his failure to do so the distraining officer shall cause the same to be done or whatever else may be necessary for its due preservation. But in every case the distrained property shall remain in charge of the distraining officer or of some other person appointed by him in his behalf.⁷⁰

If the demand be not immediately satisfied, the distraining officer shall issue a proclamation to be stuck up on a conspicuous place in the village in which the land is situated, specifying the particulars of the property distrained and the demand for which it is distrained, and notifying the place and the date when the distrained property will be sold by public auction; the day of the sale shall be so fixed as to admit of the produce being made ready for storing before its arrival.⁷¹

If before the sale of the distrained property, the defaulter or the owner of the property, where he is not the defaulter, pays into Court or to the distraining officer the amount specified in the

68. Cramer v. Mott (1870) L. R. 5 Q. B. 357.

69. S. 125 B. T. Act VIII of 1885; S. 116 R. R. Act X of 1859; S. 77 O. R. Act XXII of 1886.

70. 126 B. T. Act VIII of 1885; S.

118 R. R. Act X of 1859; S. 79 O. R. Act XXII of 1886.

71. S. 127 B. T. Act VIII of 1885; S. 124 R. R. Act X of 1859; S. 84 O. R. Act XXII of 1886.

den and with all costs, the distressant shall forthwith be withdrawn.⁷²

But if within one month from the date of the deposit, the owner of the property distrained has not instituted a suit against the applicant contesting the legality of the distressant and claiming compensation in respect of the same, the Court shall pay therefrom to the applicant the amount due to him.

When an inferior tenant makes any payment, he shall be entitled to deduct the amount from any rent payable by him to his immediate landlord, who shall in like manner be entitled to deduct the amount so deducted from any rent payable by him to his immediate landlord and so on, until the defaulter is reached. But this does not prevent the inferior tenant to institute a suit for the recovery of the amount from the defaulter.⁷³ A landlord receiving an amount deposited by an inferior tenant shall not be deemed to have consented to his tenants subletting the holding or any part thereof.⁷⁴

The sale shall be held at the place where the distrained property is, or at the nearest place of public resort where it is likely to sell to better advantage.⁷⁵ Crops or products which from their nature admit of being stored, shall not be sold before they are reaped or gathered and are ready for storing; other crops may be sold before they are reaped or gathered and the purchaser shall be entitled to enter on the land and do all that is necessary for the purpose of tending and reaping or gathering them.⁷⁶

Mode of sale.

Officers holding the sale, and all persons employed by or subordinate to such officers, are prohibited from purchasing, either directly or indirectly, any property sold by such officers.⁷⁷ Persons disregarding this prohibition are punishable under S. 185 I. P. C. The property shall be sold by public auction in one or more lots and if the demand with the costs of distress and sale is satisfied by the sale of a portion of the property, the distressant shall be immediately withdrawn with respect to the remainder.⁷⁸ It must be sold for the best price that can be obtained for them. Any neglect or mismanagement during the conduct of the sale will support

72. S. 136 B. T. Act VIII of 1885;

Act XXII of 1886.

S. 121 R. R. Act X of 1859; S. 81 O. R. Act XXII of 1886.

76. S. 129 B. T. Act VIII of 1885.

73. S. 137 B. T. Act VIII of 1885

77. S. 135 B. T. Act VIII of 1885;

74. S. 136 B. T. Act VIII of 1885.

S. 133 Act X of 1859; S. 93 O. R. Act

75. S. 128 B. T. Act VIII of 1885;

XXII of 1886; S. 139 N. W. P. T. Act

S. 129 R. R. Act X of 1859; S. 89 O. R.

XII of 1881.

78. S. 130 B. T. Act VIII of 1885.

LECTURE XII. a claim for not selling at the best price. The mere fact that the sale has been conducted irregularly does not deprive the purchaser of a good title to the goods,⁷⁹ though if the sale is altogether wrongful (so that in effect there has been no sale at all) he acquires no title against the true owner.⁸⁰ If a fair price is not offered to the sale and if the owner of the property applies to have the sale postponed till the next day or the next market day, the sale shall be postponed until that day and shall be then completed whatever price may be offered for the property.⁸¹

The remedy by distress must not be used in an oppressive manner and the general rule is that a landlord may not split one entire demand and distrain twice for the same rent when he might have taken enough on the first occasion.⁸² But where the rent in arrear consists of several instalments of rent falling due on different days, there may be a separate distress for each.⁸³

Certificate of
sale. The price of every lot shall be paid at the time of sale or as soon thereafter as the officer conducting the sale directs and in default of such payment the property shall be resold.⁸⁴ When the purchase-money has been paid in full, the officer holding the sale shall give the purchaser a certificate describing the property purchased and the price paid.⁸⁵ No appeal lies from any order passed by a Civil Court in respect of distress, but if an application for restraint has been wrongly allowed or granted, any person whose property is distrained may institute a suit against the applicant for the recovery of compensation.⁸⁶

(a) Illegal
distress.

An illegal distress is one which is wrongful in the very outset, that is to say, either where there is no right to distrain, or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. In such a case the distrainer is a trespasser *ab initio*.⁸⁷ When a man under colour of legal authority

79. Lyon v. Weldon (1824) 2 Bing. 334.

80. Harding v. Hall (1866) 14 L. T. 410; King v. England (1864) 33 L. J. Q. B. 145.

81. S. 131 B. T. Act VIII of 1885; S. 130 Act X of 1859; S. 90 O. R. Act XXII of 1886.

82. Dawson v. Cropp (1845) 1 C. B. 961; Grunnell v. Welch (1905) 2 K. B. 650, aff. (1906) 2 K. B. 555.

83. Gambrell v. Falmouth (1835) 4 Ad. & El. 73.

84. S. 132 B. T. Act VIII of 1885; S. 131 Act X of 1859; S. 91 O. R. Act XXII of 1886.

85. S. 133 B. T. Act VIII of 1885; S. 131 R. R. Act X of 1859; S. 91 O. R. Act XXII of 1886.

86. S. 140 B. T. Act VIII of 1885.
87. Grunnell v. Welch (1906) 2 K. B. 555.

does that which makes him a trespasser *ab initio*, he is in the same position as if he were a perfect stranger and it does not lie in his mouth to say that he has applied the goods, which he has so wrongfully taken, for the advantage or benefit of the person from whom he had taken them, namely, to say that the liability to pay the rent due has been discharged by his appropriation of the goods in satisfaction of the rent.⁸⁸ "The party whose goods have been wrongfully seized has a choice of remedies open to him. He may bring trespass to recover damages for the taking of the goods, but it may be that this remedy is inadequate and the immediate recovery of goods themselves may be of greater consequence to him than the recovery of damages."⁸⁹

Where there has been a distress which is wholly illegal and not merely irregular or excessive, the tenant has his remedy by replevin, *i.e.*, redelivery of the crops wrongfully distrained. Thus, it lies where the relationship of landlord and tenant did not exist, or where there was occupation but no demise at a fixed rent, or where no rent was in fact due or was released before distress, or where the tenant has satisfied the rent by payments on behalf of the landlord necessary to protect his own possession, or where the title of the person distraining has expired and he is not entitled to the rent, or where the entry was illegal, or where the crops have been distrained after tender of rent and costs.⁹⁰

Remedies.
i. Replevin.

The proceedings must be brought by the owner of the crops, that is, the person who has the property absolute or qualified in the crops. A special property in them, such as, that of a bailee or pledgee is sufficient. An executor may sue in replevin to recover his testator's goods. A landlord may sue to set aside a wrongful distraint of his tenants crops made by a stranger.⁹¹

A distress does not, until sale, divest the tenant of the property in the goods, or in point of law, vest the possession of them in the landlord. Although a resue is generally a breach of the law, there are some cases in which it is a legal remedy of an aggrieved person, that is to say, when a distress is wholly wrongful and not merely irregular or excessive.⁹² Resue in such cases can only be legally

ii. Resue.

88. *Attack v. Bramwell* (1863) 32 L. J. Q. B. 146.

89. Per *Bovill C. J.*, in *Gibbs v. Cruikshank* (1873) L. R. S. C. P. 454.

90. *Foa's Landlord and Tenant*, 5th

Edn. p. 567.

91. *Horro Narain v. Soodha Kristo*

4 Cal. 890; 4 C. L. R. 32.

92. *Keen v. Priest* (1859) 28 L. J.

Ex. 157.

LECTURE XII. made by the tenant or the owner of the goods or his servant or agent and not by a stranger.

iii. Injunction. The Courts do not generally interfere by injunction, unless it is a flagrant case with the right of the landlord to distrain for rent, enabling him if the rent is in arrear to obtain security for its payment, except upon the condition of the applicant paying the amount claimed for rent in Court.⁹³ Lord Cottenham L.C., laid down the principle :—“The Court ought not to interfere for the purpose of preventing a party from enforcing a legal claim without securing to itself the means of putting him in the same position in the event of his turning out to be right, as if the Court had not interfered.”⁹⁴

iv. Damages. In the case of an illegal distress the distrainer is a trespasser *ab initio* and the full value of the goods which have been lost to the plaintiff without any deduction for rent is recoverable as damages, unless there are circumstances of mitigation.⁹⁵

Where the landlord abused his power of distress by distraining the crops which belong to the tenant on the pretence that they belong to another person, there has been an invasion of the rights of the tenant for which he is entitled to a remedy and is not deprived of the ordinary right of action which any person who suffers from a tortious act has against the tort-feasor.⁹⁶

(b) Irregular distress. A distress is irregular when, although the levy was legal and in order, the subsequent proceedings have been conducted in an unlawful manner. Thus, selling without having served notice of the distress, selling before the day fixed for the sale, selling growing crops before they are gathered, selling for otherwise than the best price, improper dealing with any overplus, detaining or removing the goods distrained when a tender of rent and costs is made after distress, are instances of irregular distress. For a distress that is only irregular and not illegal at the outset, the distrainer is not treated as a trespasser *ab initio*; and a person who purchases goods under an irregular distress acquires a good title to the goods and the remedy of the tenant is in damages as against the landlord.⁹⁷

93. Walsh v. Lonsdale (1882) 21 Ch.

Koer 1 C. W. N. 318.

D. 9; Shaw v. Jersey (1879) 48 L. J. Q. B. 308.

96. S. 140 B. T. Act VIII of 1885;

94. Sanxter v. Foster (1841) Cr. & Ph. 302.

Jagdeo Singh v. Padarath 25 Cal. 285;

95. Attack v. Brunwell (1863) 32

Bishun Singh v. A. W. N. Wyatt 16

L. J. Q. B. 146; Grummell v. Welch (1906) 2 K. B. 555; Hanuman v. Gobind

C. W. N. 540; Clissold v. Cratchley

(1910) 2 K. B. 214.

97. Wallace v. King (1788) 1 H. Bl.

13; Whitworth v. Smith (1832) 5 C.

An excessive distress is illegal.⁹⁸ But an action for irregularity in dealing with a distress cannot be maintained without proof of special damage on failure of which the plaintiff is not entitled to even nominal damage.⁹⁹ Excess is relative. The value of the goods seized must be obviously disproportioned to the rent and costs taking into consideration the conditions under which a forced sale of the effects must take place.¹⁰⁰ "The sale is a compulsory one and therefore you may look at the price likely to be realized on a sale by auction and this is a good practical test. The plaintiff must make out that more goods were seized than were reasonably necessary for the purpose of realizing at a sale by auction the amount of rent in arrear and expenses."¹⁰¹

The landlord protects himself by seizing what any reasonable man would think adequate to the satisfaction of the claim.¹⁰² Though the price realised at auction is *prima facie* evidence of value as regards excess, it is not conclusive.¹⁰³ The distrainer is not bound to calculate very nicely the value of the property seized. He must take care that a reasonable proportion is kept between the value of the property and the sum for which he is entitled to take it.¹⁰⁴

Claiming and distraining for a greater amount of rent than is actually due does not give a right of action, if the distress is not excessive for the rent really due.¹⁰⁵ But if more goods are seized than are necessary to satisfy the actual arrears the right of action arises.¹⁰⁶ An action will not lie for merely distraining for more rent than is in arrear, although it is alleged that the distress was made maliciously.¹⁰⁷ In case of excessive distress, the tenant can not sue the person into whose possession the goods have come; his remedy is against his landlord.¹⁰⁸

& P. 250.

98. S. 117 R. R. Act X of 1859;

S. 78 O. R. Act XXII of 1886.

99 Lucas v. Tarleton (1858) 27 L. J. Ex. 246; Rodgers v. Parker (1856) 18 C. B. 112.

100. Field v. Mitchell (1807) 6 Esp. 71.

101. Rapley v. Taylor (1883) Cab. & El. 150 per Cave J.

102. Roden v. Eyton (1848) 6 C. B. 427.

103. Rapley v. Taylor (1883) Cab. &

El. 150; Smith v. Ashforth (1860) 29 L. J. Ex. 259.

104. Willoughby v. Backhouse (1824)

2 B. & C. 821; Roden v. Eyton (1848)

6 C. B. 427.

105. Tancred v. Leyland (1851) 16 Q. B. 669.

106. Crowder v. Self (1839) 2 Mood.

& R. 190.

107. Stevenson v. Newnham (1853)

13 C. B. 285.

108. Whiteworth v. Smith (1832) 5 C. & P. 250.

LECTURE XII.

In a suit for damages for excessive distress the tenant must prove what loss he actually sustained.¹⁰⁹ The damages are the fair value of the goods after deducting rent and costs.¹¹⁰ If no sale has taken place, the plaintiff is entitled to nominal, though he prove no actual damage, since the law will presume damage from a man being prevented from dealing with his property.¹¹¹ If the distress is made for more rent than is in arrear and the tenant pays the sum to get rid of the distress, he may recover the excess he was obliged to pay and damages for the annoyance he may have suffered.¹¹²

A master is liable for any wrong done by his servant or agent provided the act is done on his behalf and with the intention of serving his purposes.¹¹³ But if the act was done without the master's authority or without his knowledge or concurrence, the master is not liable.¹¹⁴

The period of limitation for a suit for compensation for an illegal, irregular, or excessive distress in one year from the date of the distress or seizure under Art. 28 or 29 and not Art. 2 Sch. I of the Limitation Act IX of 1908.¹¹⁵

Where standing crops were seized under fraudulent and fictitious proceedings of distress between a fictitious landlord and a fictitious tenant, a suit for damages is governed by Art. 36 Sch. I Limitation Act IX of 1908, the period being two years.¹¹⁶ But when crops were wrongfully removed, the period of limitation is three years under Art. 48 or 49.¹¹⁷

Under Art. 35 (j) Sch. II of the Provincial Small Cause Court Act IX of 1887, the jurisdiction of the Small Cause Court is excluded in suit "for compensation for illegal, improper or excessive distress

Small Cause Court.

109. Oojan Dewan v. Prannath 8 W. R. 220 ; Chunder Kant v. Hem Lal 1 C. W. N. 463.

110. Wells v. Moody (1835) 7 C. & P. 59 ; Sheobarat v. Nawrangdeo 28 Cal. 364.

111. Chandler v. Doulton (1865) 34 L. J. Ex. 89.

112. Fell v. Whittaker (1871) L. R. 7 Q. B. 120.

113. S. 114 R. R. Act X of 1859 ; Iswar Chunder v. Satis Chunder 30 Cal. 207 ; 7 C. W. N. 126.

114. Shamasooduree v. Mallyut Mun-

dul 11 W. R. 1101 ; Ramjoy v. Kallymohun Marsh. 282.

115. Jagatjiban v. Sarat Chandra 7 C. W. N. 728 ; Kalicharan v. Kismat Mollah 11 C. W. N. lxxvi ; but see Tarinee Churn v. Shumbhoonath 3 W. R. (Act X) 139.

116. Jadu Nath v. Hari Kar 36 Cal. 141 ; 12 C. W. N. 1090 ; 9 C. L. J. 109 ; Hari Charan v. Hari Kar 32 Cal. 459 ; 9 C. W. N. 376 ; see however Mangun Jha v. Golab Koer 25 Cal. 692.

117. Jadu Nath v. Hari Kar 17 C. L. J. 206.

or attachment."¹¹⁸ But where the plaintiff paid money under the pressure of a distress warrant, the suit is not one in tort but for money had and received and cognizable by a Small Cause Court, and Art. 35 (j) is no bar.¹¹⁹

If any person otherwise than in accordance with the law for the time being in force (a) distrains or attempts to distrain, or (b) resists a distraint or removes any property duly distrained, or (c) prevents reaping, gathering, storing removing or otherwise dealing with any produce of a holding, he shall be deemed to have committed criminal trespass under S. 447 I.P.C. and one abetting him shall be deemed to have abetted the commission of criminal trespass.¹²⁰

Out of the sale proceeds, shall be paid first the costs of the distraint and sale ; the remainder shall be applied to the discharge of the arrear for which the distress was made with interest thereon up to the day of sale ; and the surplus (if any) shall be paid to the person whose property has been sold.¹²¹ Sale-proceeds.

118. Hyder Ali v. Jafar Ali 1 Cal. 183 ; Dewan Roy v. Sundar Tewary 24 Cal. 163 ; Judgeo Sing v. Padarath 25 Cal. 285 ; Pamu Sanyasi v. Zemindar of Jayapur 25 Mad. 540.

119. Chairman, Santipur Municipality v. Bepin Behari 3 Ind. Cas. 429.

120. S. 186 B. T. Act VIII of 1885 ; Ss. 145 R. R. Act X of 1859.
121. S. 134 B. T. Act VIII of 1885 ; S. 132 R. R. Act X of 1859 ; S. 92 O. R. R. Act XXII of 1886 ; S. 138 N. W. P. T. Act XII of 1881.

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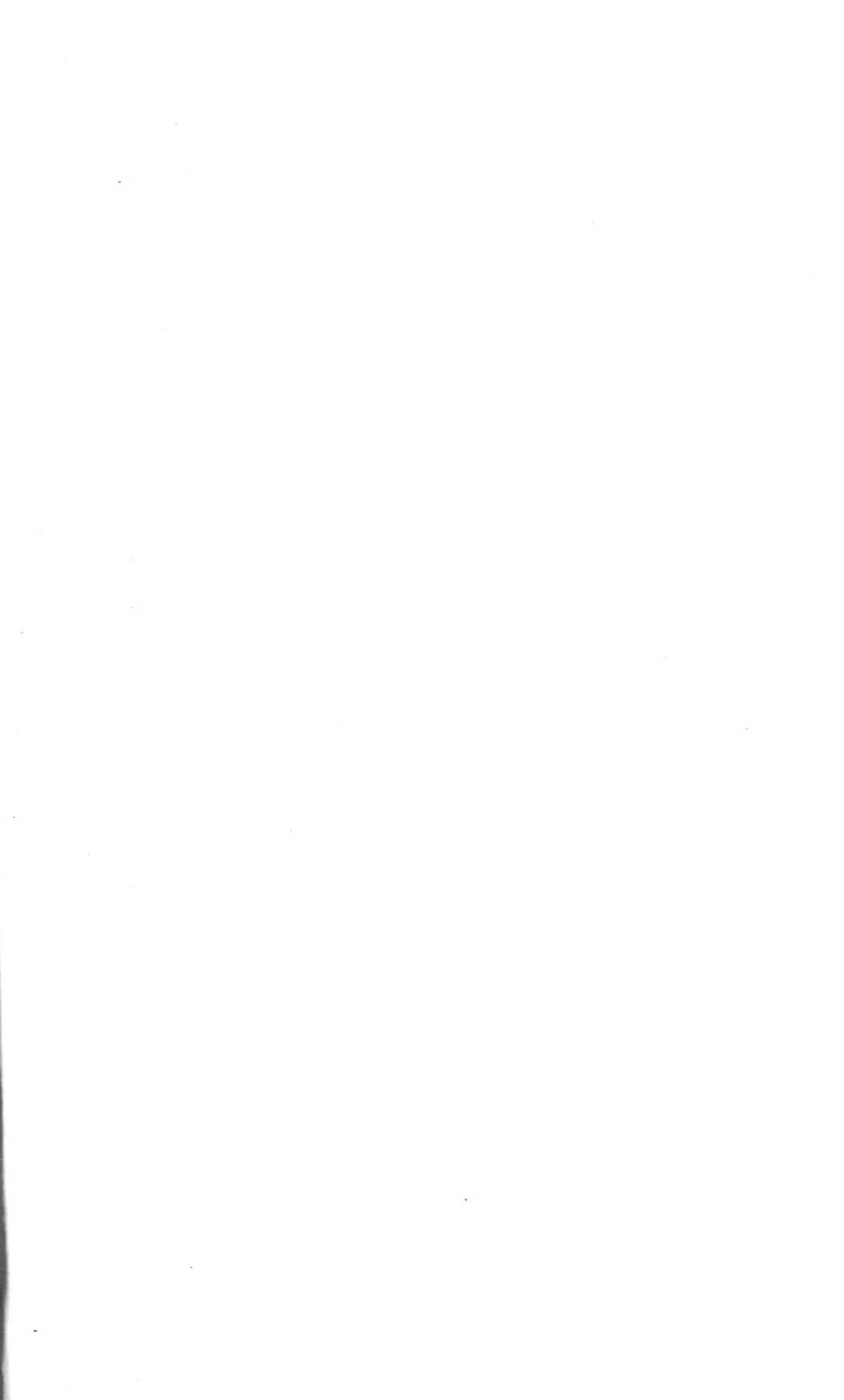
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